Docket for 03-724

(26)

No. 03-724 Status: ARGUED
Title: F. Hoffmann-LaRoche, Ltd., et al., Petitioners
v.
Empagran S.A., et al.
Docketed: November 18, 2003
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (01-7115)
Decision Date: January 17, 2003
Rehearing Denied: September 11, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 13 2003	Petition for a writ of certiorari filed. (Response due December 18, 2003)
Nov 14 2003	Brief of respondents Empagran S.A., et al. in opposition filed.
Nov 24 2003	Letter from counsel for the Federal Republic of Germany as amicus curiae received.
Nov 24 2003	Reply of petitioners F. Hoffmann-LaRoche Ltd., et al. filed. (Distributed)
Nov 25 2003	DISTRIBUTED for Conference of December 12, 2003.
Nov 26 2003	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States.
Dec 1 2003	Brief amicus curiae of Federal Republic of Germany filed. (Distributed)
Dec 15 2003	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States GRANTED. Justice O'Connor took no part in the consideration or decision of this motion.
Dec 15 2003	Petition GRANTED. Justice O'Connor took no part in the consideration or decision of this petition.
Jan 21 2004	Extension of time within which to file petitioners' brief on the merits and the joint appendix to and including February 3, 2004.
Jan 29 2004	Extension of time within which to file respondents' brief on the merits to and including March 15, 2004.
Jan 30 2004	Brief amicus curiae of The Business Roundtable filed.
Feb 3 2004	Brief amici curiae of Governments of the Federal Republic of Germany and Belgium filed.
Feb 3 2004	Brief amici curiae of Chamber of Commerce of the United States and Organization for International Investment filed.
Feb 3 2004	Brief amicus curiae of United States filed.
Feb 3 2004	Brief amici curiae of United Kingdom of Great Britain and Northern Ireland and Kingdom of the Netherlands filed.
Feb 3 2004	Brief amicus curiae of European Banks filed.
Feb 3 2004	Brief amicus curiae of Government of Japan filed.
Feb 3 2004	Joint appendix filed.
Feb 3 2004	Brief of petitioners F. Hoffmann-LaRoche Ltd., et al. filed.
Feb 3 2004	Brief amicus curiae of Canada filed.
Feb 3 2004	Brief amicus curiae of International Chamber of Commerce filed.
Mar 2 2004	SET FOR ARGUMENT MONDAY, APRIL 26, 2004.
Mar 3 2004	CIRCULATED.

Mar 5 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 12 2004	Brief amicus curiae of Public Citizen filed. (Distributed)
Mar 12 2004	Consent to the filing of amicus briefs in support of respondents received from counsel for respondents
Mar 15 2004	Brief of respondents Empagran S.A., et al. filed.
Mar 15 2004	Brief amici curiae of Economists Joseph E. Stiglitz and Peter R. Orzag filed. (Distributed)
Mar 15 2004	Brief amici curiae of Professors Darren Bush, et al. filed. (Distributed)
Mar 15 2004	Brief amici curiae of Committee to Support Antitrust Laws, et al. filed. (Distributed)
Mar 15 2004	Brief amici curiae of Certain Professors of Economics, B. Douglas Bernheim, et al. filed. (Distributed)
Mar 15 2004	Brief amici curiae of Legal Scholars Harry First and Eleanor M. Fox filed. (Distributed).
Mar 15 2004	Brief amici curiae of Law Professors Ralf Michaels, Hannah Buxbaum and Horatia Muir Watt filed. (Distributed)
Mar 16 2004	Record received from U.S.C.A. for District of Columbia Circuit. (1 box) (A portion of the record is sealed)
Apr 5 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice O'Connor took no part in the consideration or decision of this motion.
Apr 9 2004	Reply of petitioners F. Hoffmann-LaRoche Ltd., et al. filed. (Distributed)
Apr 9 2004	Record received from U.S.D.C. for District of Columbia Circuit. (3 folders)
Apr 26 2004	Argued. For petitioners: Stephen M. Shapiro, Chicago, Ill.; and on behalf of the United States, as amicus curiae, R. Hewitt Pate, Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. For respondents: Thomas C. Goldstein, Washington, D.C.

Supreme Court, U.S.
FILED
NOV 13 2003

No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District of Columbia Circuit, in a divided opinion, interpreted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, to permit U.S. antitrust claims by foreign buyers based on transactions with foreign sellers conducted entirely in foreign countries. Rehearing was denied by a 4-3 vote. The D.C. Circuit's decision conflicts with decisions of other courts of appeals and with the views of the United States. The question presented is as follows:

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

PARTIES TO THE PROCEEDINGS BELOW

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., Hoechst Marion Roussel S.A., Rhône-Poulenc S.A., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corp., Daiichi Fine Chemicals, Inc., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Bioproducts Incorporated, Chinook Group Ltd., Cope Investments Ltd., Degussa AG, Degussa Corp., DuCoa, L.P., DCV, Inc., EM Industries, Inc., Merck KGaA, E. Merck, Lonza Inc., Lonza AG, Alusuisse-Lonza Group Ltd, Mitsui & Co., Ltd., Nepera, Inc., Reilly Chemicals, S.A., Reilly Industries, Inc., Sumitomo Chemical Co., Ltd., Sumitomo Chemical America, Inc., Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents: Empagran, S.A., Nutricion Animal, S.A., Winddridge Pig Farm, Brisbane Export Corp. Pty, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holding Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holding Ltd. Novartis AG has no representation on Roche Holding Ltd's board of directors and does not in any way control Roche Holding Ltd or any of its subsidiaries. Apart from Roche Holding Ltd (and, indirectly, Novartis

AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI") and Roche Vitamins Inc. ("RVI") are indirect subsidiaries of Roche Holding Ltd. Apart from Roche Holding Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

No publicly-held company has notified BASF Aktiengesellschaft ("BASF AG") that it owns a 10% or greater interest in BASF AG.

Apart from BASF AG, there is no publicly-held company that owns a 10% or greater interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.) and Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) are wholly-owned indirect subsidiaries of Rhône-Poulenc S.A. ("RPSA"), n/k/a Aventis SA, which is a publicly-traded holding company. Hoechst Marion Roussel S.A. is a wholly-owned indirect subsidiary of Hoechst A.G. RPSA, n/k/a Aventis SA, owns substantially all of the outstanding shares of Hoechst A.G. Apart from RPSA, n/k/a Aventis SA, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel S.A.

Takeda Chemical Industries, Ltd. ("TCI") has no parent company, and to the best of its knowledge there is no publicly-held company with a 10% or greater ownership interest in TCI.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TCI. TVFU was merged into BASF Corporation as of approximately January, 2001.

Daiichi Pharmaceutical Co., Ltd. is the direct parent of Daiichi Pharmaceutical Corp. and the indirect parent of Daiichi Fine Chemicals, Inc. There is no publicly-held company with a 10% or greater ownership interest in Daiichi Pharmaceutical Co., Ltd.

Daiichi Pharmaceutical Corp. is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharmaceutical Corp. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corp. was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. was prior to October 2002 a direct subsidiary of Daiichi Pharmaceutical Corp., which in turn is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

There is no publicly-held company with a 10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is an indirect subsidiary of Eisai Co., Ltd. There is no publicly-held company with a 10% or greater ownership interest in Eisai U.S.A., Inc.

Eisai Inc. is an indirect subsidiary of Eisai Co., Ltd. There is no publicly-held company with a 10% or greater ownership interest in Eisai Inc.

Akzo Nobel Chemicals B.V. and Akzo Nobel Inc. are indirect, wholly-owned subsidiaries of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated. There is no person or entity that owns 10% or more of this publicly-traded company. Mitsui & Co. (U.S.A.), Inc., a wholly-owned subsidiary of Mitsui & Co., Ltd., owns an 80% interest in Bioproducts Incorporated.

Chinook Group Ltd. is a wholly-owned subsidiary of Cope Investments Ltd. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Ltd.

There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Ltd.

Two German companies, E.On AG and RAG, collectively own 93% of Degussa AG's (f/k/a Degussa-Hüls AG) stock. No other entity owns more than 10% of Degussa AG's stock.

Degussa Corp. (f/k/a Degussa-Hüls Corporation) is a subsidiary of Degussa AG. Apart from Degussa AG, and indirectly, E.On AG and RAG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corp.

There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

There is no publicly-held company with a 10% or greater ownership interest in E. Merck or Merck KGaA.

E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc., now known as EMD Chemicals Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd. It is a 100%-owned subsidiary of Alcan Inc., a public company.

Lonza AG is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Nepera, Inc. is a wholly-owned subsidiary of Cambrex Corporation, a publicly-held company.

Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Co., Ltd.

Sumitomo Chemical America, Inc. is a wholly-owned subsidiary of Sumitomo Chemical Co., Ltd.

Tanabe U.S.A. Inc. is an indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A. Inc.

Service Specialties, Inc., f/k/a UCB Chemicals Corp., is wholly-owned by UCB, Inc., which in turn is wholly-owned by UCB S.A. UCB S.A. is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	xi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	8
I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH THE VIEWS OF THE UNITED STATES	8
II. THE COURT OF APPEALS MISCONSTRUED THE FTAIA	12
A. The FTAIA Does Not Authorize Claims Seeking to Remedy Injuries Sustained in Purely Foreign Commerce	13
B. The Grounds Advanced by the Court Below Cannot Support Its Construction of the FTAIA	17
C. The Court of Appeals Ignored Antitrust Standing and Injury Requirements Recognized in This Court's Decisions	20
III. THE FREQUENTLY RECURRING QUESTION PRESENTED IN THIS CASE HAS EXCEPTIONAL PUBLIC IMPORTANCE	22
CONCLUSION	24

TABLE OF CONTENTS—Continued

APPENDIX

	Page
Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated January 17, 2003	1a
Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing, dated September 11, 2003	43a
Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing En Banc, dated September 11, 2003	44a
Memorandum Opinion of the United States District Court for the District of Columbia, dated June 7, 2001	45a
Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc by the United States Court of Appeals for the District of Columbia Circuit	63a

TABLE OF AUTHORITIES

CASES

	Page
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	11, 21
Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986)	21
de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510 (S.D.N.Y. 1985)	12
Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002)	6, 9, 15, 19, 22
EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)	15
Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984)	12
Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001), *appeal docketed sub nom. BHP N.Z., Ltd. v. UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340, 01-3991 (3d Cir. Aug. 29, 2001)	12
Galavan Supplements, Ltd. v. Archer Daniels Midland Co., No. C 97-3259 FMS, 1997 WL 732498 (N.D. Cal. Nov. 19, 1997)	12
Gustafson v. Alloyd Co., 513 U.S. 561 (1995)	14
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)	16
Holloway v. United States, 526 U.S. 1 (1999)	15
Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)	14
Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340)	6, 8-9, 10, 19
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	15-16

TABLE OF AUTHORITIES—Continued

	Page
Metallgesellschaft AG v. Sumitomo Corp., 825 F.3d 836 (7th Cir. 2003)	9
In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D. Md. 2001)	12
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)	23
National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998)	14
Pfizer Inc. v. Government of India, 434 U.S. 308 (1978)	7, 19
Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968)	18
Pierce County v. Guillen, 537 U.S. 129 (2003)	16
Sniado v. Bank Aus., AG, 174 F. Supp. 2d 159 (S.D.N.Y. 2001)	12
Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001)	15
Turicentro, S.A. v. American Airlines, Inc., 303 F.3d 293 (3d Cir. 2002)	9, 11, 21
United Phosphorus, Ltd. v. ANGUS Chem. Co., 322 F.3d 942 (7th Cir. 2003), *petition for cert. denied*, 72 U.S.L.W. 18 (Nov. 10, 2003) (No. 03-203)	17-18
United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)	16

STATUTES

15 U.S.C. § 1	2, 4
15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982)	*passim*
15 U.S.C. § 15	4, 5
18 U.S.C. § 3571	19
28 U.S.C. § 1254(1)	2

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1331	5
28 U.S.C. § 1337	5

LEGISLATIVE HISTORY

H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487	4, 14, 17, 21, 23

MISCELLANEOUS

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John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983)	16-17
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R. Hewitt Pate, *Roundtable Conference with Enforcement Officials*, 71 ANTITRUST L.J. 333 (2003)	22
Spencer W. Waller, ANTITRUST AND AMERICAN BUSINESS ABROAD (3d ed. 2002)	23-24
Wilbur L. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS (5th ed. 1996)	23

IN THE

Supreme Court of the United States

No. ___

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 338. App., *infra*, 1a-42a. The orders of the court of appeals denying petitioners' petition for rehearing and petition for rehearing en banc are unreported. App., *infra*, 43a, 44a. The opinion of the district court is unreported. App., *infra*, 45a-62a.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2003. Petitioners' timely petitions for rehearing and for rehearing en banc were denied on September 11, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (1982), codified at 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

STATEMENT

This petition presents a frequently recurring question of exceptional importance that has divided the federal courts of appeals: whether plaintiffs may sue under U.S. antitrust law to remedy injuries arising from the effects of anticompetitive conduct on purely foreign commerce. A divided panel of the court below answered yes, holding that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, provides foreign plaintiffs with a U.S. antitrust remedy for injuries sustained entirely outside U.S. commerce. According to that ruling, foreign plaintiffs may assert U.S. antitrust claims so long as the conduct that caused their injury also affected U.S. commerce and the effects on U.S. commerce "give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." App., *infra*, 4a.

The Second and Fifth Circuits previously have reached conflicting conclusions as to whether the FTAIA authorizes or prohibits Sherman Act claims arising solely from injuries sustained in foreign commerce. The D.C. Circuit's decision in this case expressly conflicts with the Fifth Circuit's decision and rejects the reasoning of the Second Circuit. It is also inconsistent with a recent Third Circuit ruling that foreign plaintiffs injured in purely foreign transactions lack standing to assert Sherman Act claims.

Review by this Court is warranted. The federal courts are divided over an important and frequently recurring question of the extraterritorial reach of the U.S. antitrust laws. Congress did not intend to have the federal antitrust laws regulate transactions between foreign buyers and foreign sellers in foreign countries. As the Solicitor General argued below as *amicus curiae* in support of en banc review, the D.C. Circuit's decision fundamentally misconstrues the FTAIA, threatens to undermine the U.S. government's antitrust enforcement efforts and will needlessly flood U.S. courts with foreign claims.

1. Statutory Background. Section 1 of the Sherman Act prohibits restraints of trade or commerce within the United States or "with foreign nations." 15 U.S.C. § 1. Section 4 of the Clayton Act provides a private remedy to persons injured "by reason of anything forbidden in the antitrust laws." § 15. Together, they establish a scheme of civil liability for injuries resulting from restraints on U.S. commerce. Neither statute expresses any concern with the effects of anticompetitive conduct on purely foreign commerce.

The FTAIA was enacted in 1982 to address concerns that unduly expansive projection of federal antitrust law would hinder U.S. global competitiveness. The FTAIA did not expand the jurisdictional reach of U.S. law to impose liability for injuries sustained in transactions entirely outside U.S. commerce. To the contrary, the FTAIA *limits* the extra-territorial scope of the Sherman Act. It states that the antitrust laws "shall not apply" to conduct involving commerce with foreign nations (excepting U.S. import commerce) unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* that domestic effect "gives rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. Through the latter condition, Congress required that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No. 97-686, at 10-12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

Until a 2002 decision by the Second Circuit, no court had ever held that the federal antitrust laws authorize claims seeking to remedy harms resulting solely from the effects of anticompetitive conduct on *non-U.S.* commerce. The D.C. Circuit has now also adopted that conclusion, holding that the FTAIA in effect *expanded* the extraterritorial reach of the Sherman Act. The Second Circuit and D.C. Circuit decisions both directly conflict with a 2001 ruling by the Fifth Circuit that claims seeking recovery for injuries resulting from the

foreign effects of anticompetitive conduct fall outside the jurisdictional scope of the Sherman Act. The decision below is also inconsistent with the Third Circuit's view that a plaintiff injured in purely foreign commercial transactions lacks standing to seek redress under U.S. antitrust law.

2. Factual Background. Respondents are five foreign companies located in Australia, Ecuador, Panama and Ukraine. They initiated this action in July 2000, alleging that a worldwide cartel of bulk vitamin distributors conspired to fix prices and allocate markets on a global basis in violation of the Sherman Act, and invoking the district court's jurisdiction under 15 U.S.C. § 15(a) and 28 U.S.C. §§ 1331, 1337. Respondents purport to represent a class of all foreign purchasers of vitamins from petitioners. They seek treble damages and injunctive relief based solely on vitamin purchases outside the United States. Respondents do not contend that they were injured in U.S. commerce.

The alleged vitamin cartel has prompted numerous criminal and civil proceedings both in the United States and abroad. In the United States, some petitioners have pled guilty to criminal antitrust violations and collectively paid $900 million in fines. See App., *infra*, 68a. In addition, more than 75 federal antitrust cases, including class actions, were consolidated for pretrial proceedings in the district court. The vast majority of the claims in those cases have now been settled, for amounts exceeding $2 billion. Lawsuits seeking damages for alleged violations of state law have also been filed. Outside the United States, record civil penalties exceeding €855 million have been assessed against some petitioners by the European Union, Canada, Australia and Korea. App., *infra*, 68a. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium and the Netherlands, and class actions have been filed in Canada, Australia and New Zealand.

3. The District Court Decision. The district court dismissed plaintiffs' Sherman Act claims for lack of subject matter jurisdiction, explaining that the federal antitrust laws provide no remedy to "persons injured abroad in transactions otherwise unconnected with the United States." App., *infra*, 48a, 52a. The court relied on the plain meaning of the FTAIA to rule that the Sherman Act does not apply to claims arising from vitamin purchases outside the United States with no impact on U.S. commerce. *Id.* at 48a-52a. The district court noted that its construction of the FTAIA was supported by existing case law, including the Fifth Circuit's opinion in *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). App., *infra*, 50a-51a. The Second Circuit had not yet issued its opinion adopting a contrary view of the FTAIA. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340).

4. The Court of Appeals Decision. The court of appeals reversed the district court and held that the U.S. antitrust laws provide a remedy for injuries sustained in purely foreign commerce, expressly rejecting the Fifth Circuit's contrary ruling in *HeereMac*. The D.C. Circuit ruled that so long as "*someone*, even if not the foreign plaintiff who is before the court," has an injury arising from an effect of the defendant's conduct on U.S. commerce, every foreign plaintiff with a claim arising from a purely foreign effect can sue as well. App., *infra*, 4a, 19a-20a (emphasis added). The court of appeals agreed with the result, but not the reasoning, of the Second Circuit in *Kruman*. See *id.* at 19a-20a.

The D.C. Circuit did not rest its conclusion on the text of the FTAIA, which it believed has "no 'plain meaning'." App., *infra*, 4a. Instead, the court of appeals relied on selected statements in the House Report on the FTAIA that it regarded as "consistent" with its holding and more significant than

other statements in the House Report supporting the Fifth Circuit's construction of the statute. App., *infra*, 24a-30a. The most important consideration for the court, however, was its determination that, as a matter of policy, "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." App., *infra*, 32a. The court claimed support for this conclusion in "underlying policies of deterrence" that it found "emanating" from this Court's decision in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). App., *infra*, 4a, 32a-33a. This consideration also led the court to hold that respondents have standing to pursue their claims. See *id.* at 33a-37a.

Judge Henderson dissented on the ground that "the plain language in subsection (2) of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute." App., *infra*, 42a. She added that the Fifth Circuit's construction reflects the "more natural" reading of § 6a(2) and is "unambiguously supported" by the legislative history. *Id.* at 40a.

5. The Position of the United States. On petition for rehearing en banc, the court of appeals invited the Solicitor General to submit a brief expressing the views of the United States. In response, the Solicitor General urged en banc review to reverse the decision below.[1] He explained that this case raises "an issue of exceptional and recurring importance regarding the scope of the antitrust laws." App., *infra*, 73a. The Solicitor General disagreed with the panel's ruling, in part because the "most natural reading" of the FTAIA "is that

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[1] *Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc, Empagran S.A., et al., v. F. Hoffmann-La Roche, Ltd., et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115). The brief submitted by the Solicitor General is reproduced in the appendix to this petition. App., *infra*, 63a-82a.

the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." *Id.* at 74a (emphasis in original). The Solicitor General also expressly rejected the opinion's deterrence rationale. "[C]onsiderations based on deterrence," the Solicitor General explained, "counsel *against* the panel's expansive interpretation of the FTAIA," because increasing the potential liability of antitrust offenders worldwide will discourage them from voluntarily disclosing misconduct to the Department of Justice under its corporate leniency program. *Id.* at 78a (emphasis in original).

Notwithstanding the position of the United States, the D.C. Circuit denied rehearing en banc by a 4 to 3 vote, with Judges Sentelle, Henderson and Randolph voting to grant rehearing and Judges Garland and Roberts not participating.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the conflict among the courts of appeals over the meaning of an important federal statute and to make clear that Congress did not intend to authorize antitrust claims seeking recovery for injuries resulting from the effects of anticompetitive conduct on purely foreign commerce. Resolution of this fundamental and frequently recurring issue is critical to the administration of justice and to the U.S. government's antitrust enforcement efforts and relations with foreign nations.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH THE VIEWS OF THE UNITED STATES.

The courts of appeals are sharply divided over the question presented in this petition. Both the D.C. Circuit in this case and the Second Circuit in *Kruman* expressly rejected the Fifth Circuit's holding in *HeereMac*. App., *infra*, 19a-20a;

Kruman, 284 F.3d at 396-98. The D.C. Circuit recognized the conflict over the meaning of the FTAIA, stating that "the Second and Fifth Circuits have split on this very question of statutory interpretation." App., *infra*, 14a. The Seventh Circuit has similarly noted the "conflict in the circuits" on this issue, *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 839 (7th Cir. 2003), as has the Third Circuit, see *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 306-07 (3d Cir. 2002) ("[T]he meaning of [the FTAIA] has split two of our sister circuits.").

In *HeereMac*, the first court of appeals decision to interpret the FTAIA, the plaintiff, a Norwegian oil company, had alleged that an international price-fixing conspiracy by barge companies violated the Sherman Act by inflating both the plaintiff's operating costs in the North Sea and prices for barge services in the Gulf of Mexico, a U.S. market. 241 F.3d at 421. Because the plaintiff's claim arose exclusively from its North Sea contracting and not from any impact of the conspiracy on U.S. commerce, the court held that the plaintiff's claim fell outside the subject matter jurisdiction of the federal antitrust laws. *Id.* at 426. The court explained that "the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." *Id.* at 428. The Fifth Circuit found that plain meaning confirmed by the legislative history and applicable case law, as well as by the practical implications of the plaintiff's contrary reading, which "would open United States courts to global claims on a scale never intended by Congress." *Id.* at 431. Judge Higginbotham dissented, asserting that the source of the plaintiff's injury "is irrelevant" so long as the defendant's conduct harms U.S. commerce. *Id.* at 439.

In considering the petition for certiorari in *HeereMac*, this Court invited the views of the Solicitor General. The Solicitor

General's brief, submitted on behalf of the United States and the Federal Trade Commission, stated that the Fifth Circuit's decision was "consistent with the statutory text, history, and purposes" of the Sherman Act and agreed with its ruling "that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff's claimed injuries."[2] The brief further observed that, at the time, no other federal court had adopted a contrary position.

Shortly after this Court denied review in *HeereMac*, the Second Circuit in *Kruman* adopted a view of the FTAIA directly contrary to the Fifth Circuit's interpretation. 248 F.3d at 390. The plaintiffs in *Kruman* were purchasers and sellers at foreign auctions who alleged an international conspiracy by the world's two largest auction houses to fix prices and commissions. The court concluded that, because the FTAIA amends the Sherman Act and not the Clayton Act, it does not bear on "what injury a plaintiff must suffer in order to bring suit," and thus could not be read to require that a plaintiff's injury arise from an effect on U.S. commerce. *Id.* at 397-98. In addition, according to the court, the use of the term "a claim" rather than "the plaintiff's claim" in subsection 2 of the FTAIA indicates that the Sherman Act reaches foreign conduct whenever a claim arising from a U.S. effect *could* be asserted, whether or not the plaintiff's claim *actually* arose from that U.S. effect. *Id.* at 400. A petition for certiorari filed in the *Kruman* case was dismissed after settlement by the parties.

The decision below adds to this conflict in the courts of appeals. The D.C. Circuit's determination that the FTAIA permits antitrust claims seeking to recover for harms

[2] *Brief of the United States and the Federal Trade Commission as Amici Curiae* at 5, 10-16, *Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) (No. 00-1842). The brief submitted by the Solicitor General in *HeereMac* is available at http://www.usdoj.gov/atr/cases/f9800/9844.pdf.

sustained in purely foreign commerce directly conflicts with the Fifth Circuit's construction of the statute. The D.C. Circuit found "no 'plain meaning'" in § 6a(2) of the FTAIA, expressly rejecting the Fifth Circuit's conclusion that "'a claim' plainly refers to the plaintiff's claim." App., *infra*, 4a, 19a. The D.C. Circuit generally agreed with the Second Circuit's holding in *Kruman*, but concluded that its reasoning that the FTAIA's conditions are met whenever suit could be brought by the U.S. government, whether or not any private litigant could sue, "reach[ed] too far." App. *infra*, 4a. This disagreement in the courts of appeals over the proper interpretation of the FTAIA calls for review by this Court.

In addition, the D.C. Circuit's ruling that respondents have standing is inconsistent with the Third Circuit's decision in *Turicentro* that plaintiffs whose injuries occurred exclusively in foreign markets lack standing. 303 F.3d at 307. In *Turicentro*, the Third Circuit affirmed dismissal of antitrust claims by foreign travel agents who alleged that airlines had conspired to fix their commissions. The plaintiffs had not alleged any harm to U.S. commerce from the alleged conspiracy and thus failed to satisfy even the first condition of the FTAIA. *Id.* at 304-06. In addition, the court ruled, the plaintiffs lacked standing, based on the principle set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977), that the plaintiff's injury must "flow from that which makes the defendant's acts unlawful." *Id.* at 307. Because the plaintiffs' injuries occurred exclusively in foreign markets, the Third Circuit held that they were "not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." *Id.* at 307.

There now are four conflicting opinions from the courts of appeals as to whether the U.S. antitrust laws reach the effects of anticompetitive conduct on foreign commerce. These opinions, together with two dissenting opinions, comprehensively set forth the competing considerations of law and

policy. The United States government and the Federal Trade Commission have provided their views on this recurring question of importance.[3] This circuit conflict is now ripe for the Court's resolution, and this case provides an ideal vehicle for resolving the conflict.

II. THE COURT OF APPEALS MISCONSTRUED THE FTAIA.

The FTAIA does not permit claims seeking to recover for injuries resulting from the effects of anticompetitive conduct on foreign commerce. The court of appeals' contrary ruling is refuted by the FTAIA's text, especially when read in light of essential canons of construction and the statute's purpose. The court below disregarded these key determinants of statutory meaning, relying instead on a misreading of the legislative history and its own policy judgment that its ruling was "necessary to protect U.S. commerce from global conspiracies." App., *infra*, 32a. That judgment is unsupported by any law or precedent of this Court and has been criticized by the federal agencies responsible for antitrust enforcement. Finally, the court's construction of the FTAIA is inconsistent with longstanding principles of U.S. antitrust law.

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[3] The recurring nature of the question is evidenced by the large and growing number of cases in which the district courts have addressed the issue. In addition to *HeereMac*, *Kruman* and this case, see, *e.g.*, *Sniado v. Bank Aus., AG*, 174 F. Supp. 2d 159, 170 (S.D.N.Y. 2001) (dismissing for lack of subject matter jurisdiction); *Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704-05 (E.D. Pa. 2001) (same), *appeal docketed sub nom. BHP N.Z., Ltd. v. UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340, 01-3991 (3d Cir. Aug. 29, 2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1107 (S.D.N.Y. 1984) (same); see also *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001) (dismissing for lack of standing); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997) (same); *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (same).

A. The FTAIA Does Not Authorize Claims Seeking to Remedy Injuries Sustained in Purely Foreign Commerce.

The restrictive nature of the FTAIA is made clear by its text, by canons of statutory construction that discourage the extraterritorial projection of U.S. law without a clear textual mandate and by the statute's evident purpose.

1. Statutory Text. As the Solicitor General has argued, "the most natural reading" of the FTAIA is that it does not allow claims to remedy harms arising from the foreign effects of anticompetitive conduct. App., *infra*, 74a. The preamble's negative mandate—that the Sherman Act "shall not apply"—precludes U.S. antitrust scrutiny of conduct involving foreign commerce "unless" two conditions are satisfied, each of which is tied to an effect on U.S. commerce. 15 U.S.C. § 6a. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. § 6a(1). Second, "such effect" must "give[] rise to a claim" under the Sherman Act. § 6a(2). These conditions are followed by a concluding proviso that confirms the FTAIA's restrictive purpose: although the Sherman Act may apply to export trade with foreign nations, it does so only in the case of "a person engaged" in such trade "*in the United States*" and "*only* for injury to export business *in the United States*." § 6a (emphasis added.).

This cumulative language of limitation repeatedly returns to domestic effects as the sole concern of U.S. antitrust law. It cannot plausibly be read to *expand* the jurisdictional reach of that law to the foreign effects of anticompetitive conduct. As the Solicitor General explained in urging en banc rehearing below, "[the FTAIA's] text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." App., *infra*, 75a.

The court of appeals theorized that the phrase "a claim" instead of "the plaintiff's claim" in subsection 2 created an "ambiguity" as to the FTAIA's meaning. App., *infra*, 19a-20a. But as the Solicitor General has stated, "the most natural reading of Section 6a(2)'s requirement that 'such effect gives rise to a claim' is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." App., *infra*, 74a (emphasis in original). This Court has refused to use "[t]he article 'a'" to determine a provision's meaning, *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998), or to "ascrib[e] to one word a meaning so broad that it...[gives] unintended breadth" to a statute, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). See also *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (surrounding language indicated that Congress intended "a precise and narrow application" of statutory provision). If Congress had intended the FTAIA to authorize *everyone* to bring an antitrust suit so long as *someone* could, it surely would have said so by a definite statement, not by using an indefinite article in an otherwise restrictive provision.

The significance ascribed to the "a claim" language is also refuted by its origins. The bill initially reported by the Judiciary Committee required that an effect on domestic commerce must be "the basis of the violation alleged under this Act." H.R. Rep. No. 97-686, at 1 (text of bill as reported). Chairman Rodino explained that this language was changed to state that the effect must "give[] rise to a claim" only as a "minor clarification," because technically an "effect" does not give rise to a "violation" but rather to "a claim." *Id.* at 18. This explanation confirms that the presence of the indefinite article "a" before "claim" was not intended to usher in a new wave of global antitrust litigation in U.S. courts. *Id.* at 2 (describing FTAIA "as a simple and straightforward clarification of existing American law").

The structure of the FTAIA further demonstrates that the claim before the court must arise from the effects produced by the conduct at issue on U.S. commerce. By first excluding from the reach of the Sherman Act all conduct without such effects and then requiring that those effects "give[] rise to a claim," Congress made clear that a claim under the Sherman Act *must* seek to remedy a U.S. effect. The court below disregarded this deliberate juxtaposition. See *Holloway v. United States*, 526 U.S. 1, 6 (1999) (courts must consider "placement" of statutory phrase).

2. Canons of Construction. Established canons of construction reinforce the restrictive meaning of the FTAIA. A statute may not be construed to prescribe U.S. law extraterritorially absent a "clearly expressed" intent by Congress. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). As the court of appeals recognized (App., *infra*, 20a), the FTAIA contains no language, much less "clear" language, expressing an intent by Congress to enlarge the extraterritorial application of the Sherman Act to prescribe a remedy for harms sustained in purely foreign transactions.

Federal laws must also be construed to avoid substantial constitutional difficulties whenever possible. See, *e.g.*, *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001). Given that the Commerce Clause permits Congress to regulate trade "with foreign nations," it is far from clear that it would permit the construction of the FTAIA by the court below. See *HeereMac*, 241 F.3d at 426 n.18 (questioning Congress's power "to regulate purely foreign commerce"). This constitutional concern weighs against any construction of the FTAIA that would result in U.S. regulation of purely foreign commercial transactions.

3. Statutory Context and Purpose. Finally, the historical context supports the view of the FTAIA adopted by the Fifth Circuit. As this Court has stated, "American antitrust laws do not regulate the competitive conditions of other nations'

economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Historically, the antitrust laws have been interpreted to reach activities outside the United States in order to address the effects of those activities on U.S. commerce, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945), not their effects on foreign commerce. Indeed, as the Solicitor General has observed, when Congress enacted the FTAIA in 1982, it had never been suggested that an antitrust claim may arise from an injury incurred in purely foreign commerce. See App., *infra*, 80a ("We are unaware of any decision pre-dating the FTAIA that permitted such suits.").

Nothing in the FTAIA suggests a purpose to enlarge the extraterritorial scope of the federal antitrust laws beyond their 1982 bounds. To the contrary, the FTAIA reaffirms that the exclusive focus of the antitrust laws is a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. As the Solicitor General noted below, the FTAIA was prompted "by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions." App., *infra*, 76a (emphasis added). Construed in light of its historical context, the FTAIA cannot plausibly be read to expand that reach. *Hartford Fire*, 509 U.S. at 796 n.23 ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the *United States economy*.") (emphasis added); see also *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (plain meaning of amendment "was reinforced by [its] history").

Leading commentators have recognized that the FTAIA made clear that "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers." IA Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 272h, at 358-59 (2d ed. 2000) (emphasis in original). John Shenefield, head of the

Antitrust Division from 1977-1979, confirmed the statute's restrictive purpose, noting that Congress enacted the FTAIA to resolve uncertainties "in favor of denying jurisdiction" over "conduct affecting wholly foreign commerce" and to clarify that, "[i]n such cases, private litigants have no right to recover damages." John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 364 (1983).

B. The Grounds Advanced by the Court Below Cannot Support Its Construction of the FTAIA.

The court of appeals found "no 'plain meaning'" in the text of the FTAIA. App., *infra*, 4a. It instead relied on legislative history and a policy judgment that its reading of the statute was "necessary to protect U.S. commerce from global conspiracies." *Id.* at 32a. Neither of these grounds can justify the court of appeals' decision. They are inadequate to supply the clear expression of congressional intent necessary to expand the extraterritorial application of U.S. law.

1. Legislative History Rationale. The legislative history does not support the court of appeals' interpretation of the FTAIA. The House Report explains that subsection 2 of the statute was added in order "to require that the 'effect' providing the jurisdictional nexus"—*i.e.*, the "direct, substantial, and reasonably foreseeable" effect on U.S. commerce required by subsection 1—"must also be the basis for the injury alleged." H.R. Rep. No. 97-686, at 11-12. In addition, the House Report repeatedly refers to the protections afforded to foreign purchasers under the antitrust laws "*in the domestic marketplace*." *Id.* at 10 (emphasis added). By emphasizing the need for a "nexus" to "the "domestic marketplace," Congress plainly sought to restrict Sherman Act litigation to claims involving injury incurred in U.S. commerce. As the Seventh Circuit has recognized, "the

legislative history shows that jurisdiction stripping is what Congress had in mind in enacting the FTAIA." *United Phosphorus, Ltd. v. ANGUS Chem. Co.*, 322 F.3d 942, 951 (7th Cir. 2003), *petition for cert. denied*, 72 U.S.L.W. 18 (Nov. 10, 2003) (No. 03-203).

In claiming support from the legislative history, the D.C. Circuit focused on a statement in the House Report that "the impact of the illegal conduct" need not "be experienced by the injured party *within* the United States." App., *infra*, 24a-25a (emphasis added). But this statement does not authorize an antitrust claim where the party's injury does not arise from an effect on *U.S. commerce*. It merely reiterates established law that injuries sustained abroad may be recoverable under U.S. antitrust law if the plaintiff was harmed while doing business in U.S. commerce. See, *e.g.*, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 816-17 (D.C. Cir. 1968) (holding that injuries of American companies excluded from federally-financed ocean shipping between foreign countries were actionable because they were injuries sustained in U.S. commerce). The court also wrongly inferred that, because parts of the House Report discussed only the sorts of U.S. effects that would be "sufficient," Congress must not have intended also to require that the plaintiff's claim arise from a U.S. effect. App., *infra*, 28a. Nothing in the fragments of the House Report cited by the D.C. Circuit justifies its holding that "foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce." App., *infra*, 24a. To the contrary, the legislative history demonstrates that Congress sought to restrict, not expand, the application of U.S. law to foreign controversies.

2. Deterrence Rationale. Nor does the deterrence rationale invoked by the court of appeals justify its construction of the FTAIA. The court erred by elevating its own policy judgments about optimal antitrust deterrence over Congress's

intentions as expressed in the language of the FTAIA. The court was also wrong in its assumption that antitrust deterrence would be enhanced by authorizing persons injured outside U.S. commerce to recover damages under U.S. law.

To support its expansive reading of the FTAIA, the court cited "policies of deterrence" that it viewed as "emanating" from this Court's decision in *Pfizer*. App., *infra*, 4a, 30a-33a. But *Pfizer* simply held that a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 320. *Pfizer* noted that its reading would advance deterrence, but it never suggested that U.S. antitrust law provides a remedy for injuries sustained outside U.S. commerce. To the contrary, the Court expressly stated that U.S. antitrust law should protect a foreign government that "enters *our commercial markets*." *Id.* at 318 (emphasis added).[4]

Congress has specifically prescribed what it views as sufficient deterrence, and that prescription does not include permitting claims by persons injured outside U.S. commerce. Over the years, Congress has steadily increased the criminal penalties that may be imposed on corporations for violations of the Sherman Act from $50,000 (prior to 1974) to $10,000,000 today. And actual penalties substantially exceed these amounts as a result of other provisions of the criminal code which authorize fines based on twice the corporation's pecuniary gain from price fixing or twice the victim's loss. See 18 U.S.C. § 3571. Indeed, one petitioner in this case has paid a $500 million criminal penalty to the U.S. government, the largest criminal fine ever obtained by the Department of Justice. App., *infra*, 68a. The court of appeals made no mention of the deterrent effect of these criminal sanctions (or

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[4] Only this Court can provide the necessary clarification of its ruling in *Pfizer*, which has been read to have different meanings by the majority and dissenting opinions from the Second, Fifth and D.C. Circuits. See App., *infra*, 30a-32a; *Kruman*, 284 F.3d at 403; *HeereMac*, 241 F.3d at 430; *id.* at 434-35 (Higginbotham, J. dissenting).

the fines and prison terms imposed on individuals personally) in reaching its decision that additional civil liability was "necessary" for adequate deterrence. Nor did it consider the deterrent effect of civil damages claims under state laws that permit suits by indirect purchasers barred from asserting federal claims. It also ignored the substantial deterrent effect of civil claims under foreign laws and of foreign governmental enforcement proceedings, which in the case of the alleged vitamin cartel resulted in aggregate fines exceeding €855 million. See App., *infra*, 68a.

Finally, as a matter of antitrust enforcement policy, the court of appeals' judgment is simply wrong. The federal agencies charged with enforcing the antitrust laws have already warned that the decision below will weaken, rather than enhance, deterrence. As the Solicitor General explained below, imposing treble damages liability for worldwide sales will discourage antitrust violators from disclosing criminal conduct under programs in the United States and other jurisdictions that provide amnesty from criminal prosecution. *Id.* at 78a-79a. Amnesty programs, "the number one source of leads for breaking up international cartels," promote deterrence by increasing the probability that illegal practices will eventually be detected. *Id.* at 78a. The court of appeals should not have allowed its own view of effective deterrence to override the assessment of the U.S. antitrust enforcement agencies.

C. The Court of Appeals Ignored Antitrust Standing and Injury Requirements Recognized in This Court's Decisions.

A final, and conclusive, reason to reject the D.C. Circuit's expansive view of the U.S. antitrust laws is that, as the Solicitor General explained below, it conflicts with longstanding principles of standing and antitrust injury that "Congress incorporated [into] the FTAIA." App., *infra*, 75a.

Those "longstanding principles" require an antitrust plaintiff to show that it—and not some other person—suffered "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986). A plaintiff's injury, to be actionable, must "flow[] from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Subsection 1 of the FTAIA, under any of the statute's competing interpretations, makes clear that "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce is necessary for foreign conduct to be unlawful. Accordingly, as a matter of antitrust standing, only injuries that "flow from" those U.S. effects are actionable. As the Third Circuit has recognized, injuries occurring "exclusively in foreign markets * * * are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." *Turicentro*, 303 F.3d at 307. By expressly requiring that a claim must "arise from" a U.S. effect, the jurisdictional limitation of subsection 2 of the FTAIA is consistent with the standing requirement expressed by this Court in *Brunswick*. It requires that the plaintiff's injury "flow from" the U.S. effect that makes the defendant's conduct unlawful.

To reject that conclusion, as the court below did, is to read the FTAIA as an affirmative grant of standing to persons injured in foreign commerce *even though* their injuries *do not* flow from any U.S. effect. It turns the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick*, for the benefit of foreign plaintiffs. Subsection 2 should not be interpreted as having effected so dramatic a change, because its most natural reading comports with existing law and because Congress specifically disclaimed any intent to make such a change. See H.R. Rep. No. 97-686, at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing.").

III. THE FREQUENTLY RECURRING QUESTION PRESENTED IN THIS CASE HAS EXCEPTIONAL PUBLIC IMPORTANCE.

As the Solicitor General stated in urging en banc rehearing by the court below, this case raises "an issue of exceptional and recurring importance regarding the scope of the antitrust laws." App., *infra*, 73a. R. Hewitt Pate, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, has identified the question of "foreign jurisdiction" presented in this case as one that needs "clarification" by this Court. *Roundtable Conference with Enforcement Officials*, 71 ANTITRUST L.J. 333, 374-75 (2003).

In today's global economy, it will not be difficult to allege that a wide variety of foreign "conduct" has some "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Indeed, as the Solicitor General has noted, foreign plaintiffs are bringing such claims with "increasing frequency." App., *infra*, 73a. If an antitrust claim need not arise from a U.S. effect, as the court below held, new cases from all over the world will flood the federal district courts. Foreign plaintiffs, attracted by the powerful lure of treble damages, attorneys' fees, liberal discovery, joint and several liability, class actions and jury trials, will "flock to United States federal courts" rather than pursue claims in their home countries under their own laws. *HeereMac*, 241 F.3d at 427-28. That risk is heightened by the uncabined character of the court of appeals' ruling. It is not limited to cases alleging "per se" antitrust violations, such as price-fixing or market-allocation agreements; it also permits foreign plaintiffs to pursue damages claims subject to a "rule of reason" analysis, monopolization claims and even challenges to mergers and joint ventures. As the Solicitor General has warned, the majority's position "would effect a sea change in the number and type of private actions permitted under the Sherman Act." App., *infra*, 79a.

Importing these cases into U.S. courts infringes the right of foreign nations to regulate their own markets according to their own laws and policies. A key motivation for enactment of the FTAIA was to "encourage our trading partners to take more effective steps to protect competition in their markets." H.R. Rep. No. 97-686, at 14. Congress's work has borne fruit. "[N]early 100 jurisdictions now have comprehensive antitrust laws," and "[n]early all" of these "now ban cartels either civilly or criminally." R. Hewitt Pate, *The DOJ International Antitrust Program—Maintaining the Momentum*, Speech Before the ABA Section of Antitrust Law, at 6, 8 (Feb. 6, 2003).[5] This "wave of antitrust legislation in European and other countries" (1 Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.1, at 45 (5th ed. 1996)) counsels caution in extending the reach of United States antitrust laws.

Many countries, as a matter of public policy, have rejected treble damages as "one of the most unacceptable aspects of U.S. regulatory law." Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 251 (2001). That policy choice should be respected and not voided by U.S. courts. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting "parochial concept that all disputes must be resolved under our laws and in our courts"). Permitting foreign plaintiffs to reject the means chosen by their own nations to protect competition and instead seek treble damages in U.S. courts will vastly enlarge liability for transactions otherwise governed by foreign laws and is bound to lead to "conflict and resentment" and retaliatory legislation. See ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1208-09 (5th ed. 2002) (discussing foreign "blocking statutes" that bar enforcement of U.S. treble damages judgments); see also

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[5] Transcript available at www.usdoj.gov/atr/public/speeches/200736.pdf.

Spencer W. Waller, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4:6 (3d ed. 2002) ("The perceived affront to sovereignty implicit in some forms of extraterritorial regulation has been the ground of many foreign governmental objections.").

The question presented in this case is, therefore, one of exceptional importance. Cartel conspiracy cases are massive, sprawling and expensive to litigate. The decision of the court of appeals, allowing such cases to be transported from around the globe to this country, not only compounds the burdens they impose on litigants and the U.S. judicial system but also infringes the sovereign prerogatives of foreign nations.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7115

EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

(Argued September 9, 2002 Decided January 17, 2003)

EDWARDS, *Circuit Judge*:

The action in this case was filed under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, the antitrust laws of foreign nations, and international law, on behalf of all foreign purchasers of certain vitamins, vitamin premixes, and bulk vitamin products and precursors, against a number of corporations, both foreign and domestic, who distribute and sell these vitamin products around the world. Appellants contend that appellees engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where appellees operated worldwide; and that appellees' unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to appellants in connection with their foreign purchases of vitamin products. Appellees moved to dismiss the action in the District Court, asserting that the

court lacked subject matter jurisdiction under the federal antitrust laws, because the injuries plaintiffs sought to redress were allegedly sustained in transactions that lack any direct connection to United States commerce. The District Court granted the motion to dismiss and appellants now appeal.

This appeal requires us to interpret the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, to determine the jurisdictional reach of the federal antitrust laws. FTAIA, which amended the Sherman Act, provides that the Sherman Act "shall not apply to conduct" involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States, and "such effect gives rise to a claim" under the provisions of the Sherman Act. Section 6a(1) of FTAIA makes it clear that our federal antitrust laws regulate foreign conduct only where that conduct has the proscribed "effects" on domestic or foreign United States commerce. And § 6a(2) of FTAIA provides that the antitrust laws are inapplicable unless the effect of extraterritorial conduct on United States commerce "gives rise to a claim" under the Sherman Act. The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants' conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff's claim. This *restrictive view* of FTAIA's jurisdictional reach finds support in the Fifth Circuit. *See Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

Appellants contend that the District Court misconstrued FTAIA. According to appellants, FTAIA applies to "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on United States commerce, *if*—not merely to the

extent that—the requisite United States effects are found. Thus, according to appellants, Congress did not limit jurisdiction to "the same claim" as that on which the jurisdictional effects are based. Rather, Congress provided only that "a" claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to appellants, it does not matter that the transactions in which they purchased vitamins took place outside of United States commerce. This *less restrictive view* of FTAIA's jurisdictional reach finds support in the Second Circuit. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

In the alternative, appellants claim that their complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. Appellants contend that appellees caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, appellants say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to appellants, the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad. The District Court did not address this alternative theory of jurisdiction. Neither the Second Circuit nor the Fifth Circuit embrace this view of FTAIA's jurisdictional reach, nor do we. In light of our disposition in favor of appellant on other grounds, we find it unnecessary to address this "alternative" theory of subject matter jurisdiction.

We can find no "plain meaning" in § 6a(2) of FTAIA. Nor do we find any easy resolution of this case by reference to the decisions of the Second and Fifth Circuits. The majority opinion in *Den Norske Stats Oljeselskap As v. Heeremac Vof* seems to us to endorse a view of FTAIA that is overly rigid, in light of the words of the statute and relevant portions of the legislative history. And, as we explain below, the opinion in *Kruman v. Christie's International PLC* seems to reach too far in its view of subject matter jurisdiction. Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.

We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence emanating from the Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978).

Because the foreign plaintiffs here have alleged that the United States effects of appellees' cartel give rise to antitrust claims by parties injured in the United States from transactions occurring in the United States, we hold that subject matter jurisdiction is proper. We also find that appellants have standing to sue under the antitrust laws. We therefore

reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Section 1 of the Sherman Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. § 1. Section 4 of the Clayton Act confers a cause of action on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. *Id.* § 15(a). Section 16 of the Clayton Act entitles "[a]ny person, firm, corporation or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." *Id.* § 26. In 1982, Congress enacted FTAIA, which amended the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a claim under" the Sherman Act. *Id.* § 6a. The text of FTAIA provides, in full:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

Appellees ("vitamin companies") are manufacturers and distributors of vitamins and vitamin products. Appellants ("foreign purchasers" or "foreign plaintiffs") are foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies or their alleged co-conspirators from January 1, 1988 to February 1999, for delivery outside the United States. The plaintiffs in this case originally filed a class action suit on behalf of foreign and domestic purchasers of vitamins, alleging "a massive and long-running conspiracy" among the vitamin companies and their co-conspirators "with the purpose and effect of fixing prices, allocating market share, and committing other unlawful practices designed to inflate the prices of various vitamins . . . sold to the Plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1, Joint Appendix ("J.A.") 15-16. The plaintiffs sought injunctive relief and damages under § 1 of the Sherman Act; §§ 4 and 16 of the Clayton Act; the antitrust laws of relevant foreign nations; and international law. *Id.* at ¶ 7, J.A. 19.

The vitamin companies moved to dismiss the suit as to the foreign plaintiffs pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under the federal antitrust laws, and for lack of standing under the federal antitrust laws. They also urged the District Court to decline to exercise supplemental jurisdiction over the foreign law claims, and to

dismiss the international law claims for failure to state a claim upon which relief may be granted. The District Court held that it lacked subject matter jurisdiction under FTAIA over the foreign plaintiffs' claims. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at *2-4 (D.D.C. June 7, 2001). The "critical question in this case," the District Court stated, "is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at *2. The District Court held that, because the conspiracy's effect on U.S. commerce did not cause the foreign purchasers' injury, the court did not have jurisdiction over the foreign purchasers' claims. *See id.* at *2-4.

Because the District Court dismissed the foreign purchaser's federal claims for lack of subject matter jurisdiction, it found that it did not need to reach the issue of standing with respect to the foreign plaintiffs. *See id.* at *5. The District Court declined to exercise supplemental jurisdiction over the foreign purchasers' foreign law claims, because "these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction," and because of "comity and efficiency reasons." *Id.* at *8. Finally, the District Court dismissed the foreign purchasers' claims under customary international law for failure to state a claim, because the court could not find the existence of a customary international law proscribing the conduct alleged. *See id.* at *9. The foreign purchasers filed an interlocutory appeal.

At the time of its decision, the District Court deferred ruling on the defendants' motion to dismiss the domestic plaintiffs' federal antitrust claims, and directed the domestic plaintiffs to supplement their complaint to provide more

detailed factual allegations. *Id.* at *4, 6. At the suggestion of the District Court, for practicality, *see id.* at *7 n.5, the domestic plaintiffs in the case subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the District Court, *Procter & Gamble Co. v. BASF AG*, No. 99-3046 (M.D.L. No. 1285), which involved similar claims against substantially the same defendants. The parties thereby agreed that the domestic plaintiffs had no pending claims in the instant case. On September 10, 2001, the District Court granted the defendants' motion for an order directing entry of final judgment, and on April 26, 2002, the District Court entered final judgment for the defendants in the instant case. The foreign plaintiffs' appeal is therefore no longer interlocutory.

II. ANALYSIS

A. Subject Matter Jurisdiction

This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995). A complaint may be dismissed for lack of subject matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In this case, the foreign purchasers, who bought vitamins exclusively outside the United States, allege that the vitamin companies conspired to fix vitamin prices around the world, and that the foreign purchasers paid inflated prices for vitamins abroad as a result of the global conspiracy. FTAIA makes the Sherman Act inapplicable to conduct in foreign

commerce unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and "such effect gives rise to a claim under" the Sherman Act. *See* 15 U.S.C. § 6a(1).

As an initial matter, the parties appear to dispute the scope of the "conduct" that should be considered for our FTAIA analysis. Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellants' Br. 19. Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Appellees' Br. 20-21. Both the Second and Fifth Circuits have adopted appellants' approach, and appellants' approach is correct. *See Kruman*, 284 F.3d at 398; *Den Norske*, 241 F.3d at 426. Indeed, the *Kruman* court rejected a narrow definition of "conduct" as "[t]he precise acts that caused injury," and instead adopted a broader definition of "conduct" as "acts that are illegal under the Sherman Act," that is, the international price-fixing conspiracy. *Kruman*, 284 F.3d at 398. The complaint in this case alleges an international price-fixing conspiracy among the vitamin companies, and appellees "do not contest that the vitamin cartel produced substantial effects in the United States" for the purpose of this appeal. Oral Argument Transcript, at 30-31. In light of this concession by appellees, it is unnecessary for us to explore further the precise parameters of the definition of "conduct," since there is no real dispute that the vitamin companies' conduct had "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. We therefore accept that the "direct, substantial, and reasonably foreseeable effect" requirement under § 6a(1) of FTAIA is met. Additionally, in light of appellees' concession that the vitamin cartel produced substantial effects on U.S. commerce, it is unnecessary for us to address appellees' argument that regulating foreign business transactions would exceed the powers granted to Congress under the Commerce Clause. *See* Appellees' Br. 16-17.

The precise issue presented in this appeal is whether the "gives rise to a claim" requirement under § 6a(2) of FTAIA authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect. In other words, the question is whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant's conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court.

The Supreme Court first addressed the foreign reach of the Sherman Act in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (Holmes, J.), which held that the Sherman Act did not apply to conduct occurring outside the United States. Eighteen years later, the Court moderated this approach, and held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).

In 1945, in an important opinion by Judge Learned Hand, the Second Circuit held that a federal court has jurisdiction over foreign conduct as long as the conduct was intended to, and actually did, affect U.S. commerce. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) ("*Alcoa*"). Judge Hand said that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443. Under *Alcoa*, jurisdiction depends upon whether the conduct had an effect on domestic commerce, not where the conduct took place.

"[C]onduct which has no consequences within the United States" does not come within the reach of U.S. antitrust laws. *Id. Alcoa's* "effects test" is now well accepted. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *see also* IA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 270, at 336 (2d ed. 2000) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."). The Supreme Court expressly embraced the "effects test" in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Alcoa*, 148 F.2d at 444).

In 1982, Congress enacted FTAIA, to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services." H.R. REP. NO. 97-686, at 2 (1982). As the Supreme Court has noted, "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins.*, 509 U.S. at 796-97 n.23 (citations omitted). FTAIA was also passed to enact a "single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test" that "will serve as a simple and straightforward clarification of existing American law. . . ." H.R. REP. NO. 97-686, at 2. FTAIA thus endorsed *Alcoa*'s "effects test." *See id.* at 5 ("Since Judge Learned Hand's opinion in [*Alcoa*], it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.").

Since the enactment of FTAIA, the D.C. Circuit has had one occasion to apply the statute. In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998), the court considered whether FTAIA authorizes subject matter jurisdiction over a Caribbean radio station's claim that a competing Caribbean radio station violated the Sherman Act by falsely telling U.S. advertisers that its own radio signal reached the entire Eastern Caribbean so that the advertisers would believe that it alone could fulfill their advertising needs. The precise question was whether the complaint by a foreign plaintiff against a foreign defendant adequately alleged that the latter's anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by FTAIA's first prong. This court found that the anticompetitive conduct of the defendant radio station harmed the U.S. advertisers who had to pay higher prices because of it. We stated: "In this context it appears that antitrust injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising. By keeping [the plaintiff] out of the market, [the defendant] denied such purchasers the benefit of competition." *Id.* Thus, we held that FTAIA authorized subject matter jurisdiction in that case.

The decision in *Caribbean* did not expressly address FTAIA's second prong—requiring that the effects of the anticompetitive conduct on U.S. commerce "give[ ] rise to a claim under" the antitrust laws—which is at issue in the instant appeal. However, in the course of addressing the first prong's "direct, substantial, and reasonably foreseeable effect" requirement, the *Caribbean* decision noted that the foreign radio station's "antitrust injury . . . is ultimately a harm to U.S. purchasers of radio advertising." *Id.* This conclusion followed from the facts of that case, in which the foreign company's injury and the U.S. purchasers' injury were two sides of the same coin: the defendant radio station's false representations to its U.S. advertisers had the effect of misleading the U.S. advertisers, and causing them to buy

advertising from the false advertiser at inflated prices; these purchases based on false information were what shut the plaintiff radio station out of the advertising market. Thus, it is possible to read *Caribbean* to have assumed, on the facts of that case, that the effect of the conduct on U.S. commerce gave rise to the plaintiff's claim. If so, *Caribbean* simply did not address the question at issue in the instant case, where the effect of the vitamin companies' conduct on U.S. commerce does not give rise to the plaintiffs' claim for redress.

There is another equally plausible way to read the *Caribbean* decision. Although the foreign plaintiff's loss of opportunity to sell advertising and the higher prices paid by U.S. advertisers were clearly interrelated, the higher prices paid by U.S. advertisers did not cause or give rise to the foreign plaintiff's loss of opportunity to sell advertising. One then could not say that the U.S. effect "gave rise to" the plaintiff's claim. It is thus possible that *Caribbean* impliedly interpreted the "gives rise to a claim" prong of FTAIA to be satisfied even where the U.S. effect does not "give rise to" the foreign plaintiff's claim.

We need not determine which of these two readings of FTAIA's second prong is implied by *Caribbean*. Both interpretations appear plausible. *Compare, e.g., Den Norske*, 241 F.3d at 430 ("[T]he effect on United States commerce in [*Caribbean*] . . . gave rise to the injury suffered by the plaintiff, a competing radio station—that is, exclusion of the plaintiff from the market for United States advertising dollars."), *with id.*, 241 F.3d at 436-37 (Higginbotham J., dissenting) ("[*Caribbean*] did not require that the injury to American advertisers 'give[ ] rise to' the plaintiff's cause of action; its determination that the injury gave rise to 'a' claim was sufficient."). In any event, because *Caribbean* only addressed FTAIA's "direct, substantial, and reasonably foreseeable effect" prong, we hesitate to derive a firm interpretation of the "gives rise to a claim" prong from that

case. The law of the circuit thus leaves unanswered the question whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct. This is an issue of first impression in this circuit.

1. Circuit Split

As noted above, the Second and Fifth Circuits have split on this very question of statutory interpretation. The District Court in the instant case followed the Fifth Circuit's *Den Norske* decision, which held that the federal antitrust laws do not apply to claims in which the plaintiff's injury does not arise from the conspiracy's anticompetitive domestic effect. *Den Norske*, 241 F.3d at 427. That is, even if a conspiracy results in higher prices in the United States, that domestic effect must "give rise to" the plaintiff's injury. By contrast, the Second Circuit in *Kruman* held that FTAIA allows suit by a plaintiff whose injury does not arise from the conduct's harm to domestic commerce, as long as that conduct's "domestic effect violate[d] the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. As in the instant case, the "direct, substantial, and reasonably foreseeable effect" prong of § 6a(1) was satisfied in those two cases, and the question at issue was whether the "gives rise to a claim" prong of § 6a(2) was satisfied where the U.S. effect of the conduct did not give rise to the plaintiff's claim.

In the Fifth Circuit's *Den Norske* case, a Norwegian oil corporation conducting business exclusively in the North Sea brought an antitrust conspiracy claim against providers of heavy-lift barge services, alleging that the defendants' conduct inflated the plaintiff's operating costs in the North Sea and also inflated oil prices in the U.S. market. The majority opinion in *Den Norske* interpreted the "gives rise to a claim" prong as demanding that the domestic effect give rise to the plaintiff's claim, not merely to someone's claim. *Den Norske*, 241 F.3d at 427. Because the plaintiff's injury

arose solely from the foreign effect, and not from the domestic effect of the defendant's conduct, the Fifth Circuit found subject matter jurisdiction lacking.

Judge Patrick Higginbotham dissented, writing that he was "not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct." *Id.* at 431 (Higginbotham J., dissenting). Judge Higginbotham found that the literal text of the words "gives rise to a claim" supported jurisdiction: "The word 'a' has a simple and universally understood meaning. It is the indefinite article. . . . If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have." *Id.* at 432. In light of the purpose of FTAIA "to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce," Judge Higginbotham worried that the majority's "interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States." *Id.* at 433, 434. Judge Higginbotham emphasized the deterrence rationale animating the Sherman and Clayton Acts, and feared that global conspiracies that affect U.S. commerce could be inadequately deterred in the absence of suits by foreign plaintiffs:

> Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

Id. at 435.

In the Second Circuit's *Kruman* case, buyers and sellers at foreign auctions filed suit against the two largest auction houses, Christie's and Sotheby's, alleging that the auction houses had conspired to fix prices in the United States and abroad for their services as auctioneers, and had inflated commissions. In addressing this claim, the Second Circuit explained that FTAIA is an amendment to the Sherman Act, rather than to the Clayton Act, and, as such, focuses only on the prohibition of a defendant's anticompetitive conduct, rather than on what injury a plaintiff must suffer to bring suit. Thus, the court reasoned, the argument that FTAIA limits liability to injury arising out of the conduct's domestic effect conflates the Clayton Act, to which a plaintiff's injury is relevant, and the Sherman Act, to which only a defendant's conduct is relevant. *See Kruman*, 284 F.3d at 397-99. The court then interpreted the "gives rise to a claim" language as requiring only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action." *Id.* at 400. The Second Circuit read Congress' use of the indefinite article in "gives rise to a claim" to mean that "[t]he 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act." *Id.*

The Second Circuit also relied on policy considerations in interpreting FTAIA. In line with its view that FTAIA governs what conduct by a defendant is regulated by the Sherman Act, rather than which plaintiffs can bring suit, the court reasoned that

> when anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market. When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone. Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme.

Id. at 403. Thus, the Second Circuit found that "[o]ur markets can benefit from the additional deterrence of conduct affecting foreign markets." *Id.* (citing *Pfizer*, 434 U.S. at 313-15).

2. FTAIA's Language: "Effect" that "Gives Rise to a Claim"

Appellants' and appellees' arguments regarding the meaning of FTAIA's "gives rise to a claim" language largely correspond to the reasoning adopted in the Second Circuit's and the Fifth Circuit's opinions, respectively. On the Fifth Circuit's restrictive view of FTAIA, the statute allows suit only where the plaintiff is injured by the U.S. effects of the anticompetitive conduct. *Den Norske*, 241 F.3d at 427. On the Second Circuit's less restrictive view, the statute also allows suit where the plaintiff is injured in foreign commerce by anticompetitive conduct whose "domestic effect . . . violates the Sherman Act," even if the domestic effect of the conduct does not injure the plaintiff. *Kruman*, 284 F.3d at 401.

Appellants make two arguments about the language of FTAIA that we reject. First, echoing the Second Circuit, appellants argue that the Fifth Circuit's restrictive interpretation of "gives rise to a claim" renders superfluous the concluding provision of FTAIA, which states that, if the Sherman Act applies only because the conduct affects "export commerce or export commerce with foreign nations, of a

person engaged in such trade or commerce in the United States," 15 U.S.C. § 6a(1)(B), then it applies "to such conduct only for injury to export business in the United States," *id.* § 6a. *See* Appellants' Br. 22-23; *Kruman*, 284 F.3d at 396; *Den Norske*, 241 F.3d at 432 n.5 (Higginbotham, J., dissenting). In other words, if subsections 1 and 2 of FTAIA already provide that the Sherman Act applies only where the U.S. effect gives rise to the plaintiff's injury, why would Congress need to add the final proviso that, regarding injury to export commerce, the Sherman Act only applies to injury to U.S. export commerce?

We think that there is a reading of the final proviso of FTAIA that would not render it superfluous, even if one were to adopt the Fifth Circuit's and the District Court's restrictive interpretation of "gives rise to a claim." The final proviso could be intended to clarify that, although subsection 1(B) speaks of a "person engaged in" export commerce, the Sherman Act does not extend to *all* injury sustained by such a person as a result of the defendant's anticompetitive conduct, but, rather, only to injury to his export business sustained within the United States. In other words, the proviso precludes an exporter from suing for injury to some aspect of his export business suffered outside the United States. *See* IA AREEDA & HOVENKAMP, *supra*, ¶ 262, at 360 (explaining that the final proviso "is designed to make clear that a foreign firm operating an export business in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States"). This limitation would not render the final proviso superfluous under an interpretation of subsection 2 requiring that the plaintiff be injured by the conduct's domestic effect to be able to sue.

Second, appellants place significance on the fact that, in providing that the Sherman Act shall not apply to foreign commerce "unless . . . such conduct" has a U.S. effect that

"gives rise to a claim," Congress chose the word "unless" rather than the phrase "except to the extent that." Appellants contend that "unless" enables the conduct itself to be actionable so long as the U.S. effect is present, whereas except to the extent that" would make the Sherman Act apply only to the extent that the conduct that causes the U.S. effect also gives rise to the plaintiffs' claim. *See* Appellants' Br. 17-19. This is overreading. Like the District Court, we are unconvinced that "unless" and "to the extent that" would have such different meanings in this statute.

At bottom, however, we agree with appellants that § 6a(2) supports subject matter jurisdiction in this case. Although both the Second Circuit and the Fifth Circuit found the "gives rise to a claim" language of § 6a(2) to be plain in opposite ways, we find that the language does not clearly resolve the question whether "a claim" means the plaintiff's claim. The Fifth Circuit's view that "a claim" plainly refers to the plaintiff's claim must depart from the literal language—"gives rise to a claim"—and substitute the words "gives rise to the plaintiff's claim" in order to reach the *plain meaning* to which the court subscribes. The Second Circuit construes broadly Congress' use of the indefinite article in "a claim," such that "a claim" really means "civil action . . . by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4"; hence, the words "gives rise to a claim" mean that the conduct's domestic effect "only must violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 399-400. We think that this interpretation of the words "a claim" gives short shrift to § 6a(2)'s explicit requirement that the domestic effect "give[ ] rise to a claim"—in other words, the language is far from clear as to whether that requirement can be satisfied merely by a violation of the Sherman Act, rather than by antitrust injury to the plaintiffs or others who could bring a claim under the provisions of the Clayton Act that create a cause of action for Sherman Act violations.

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim. This interpretation has the appeal of literalism. *Cf. Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting) ("The word 'a' has a simple and universally understood meaning. . . . If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have.").

Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is a [sic] faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence, which we address in parts A.4. and A.5., *infra*. We first consider the Second Circuit's structural argument in support of its less restrictive view of § 6a(2).

3. FTAIA's Structure

Appellants adopt the Second Circuit's structural argument—namely that, because FTAIA amended the Sherman Act rather than the Clayton Act, FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue. *See* Appellants' Reply Br. 6-7; *Kruman*, 284 F.3d at 397-400. Because FTAIA is an amendment to the Sherman Act,

this structural argument deems Congress in FTAIA to have addressed only the Sherman Act's prohibition of anti-competitive conduct, putting out of view the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. Appellants argue: "Since the focus of the FTAIA is on the defendants' conduct, which is regulated by the Sherman Act, it is this conduct alone that violates the Sherman Act. To require that the injury of domestic purchasers be the basis for the injury suffered by Plaintiffs . . . improperly imports a concept applicable to Section 4 of the Clayton Act." Appellants' Reply Br. 6-7.

This argument is plausible but ultimately unconvincing. The Clayton Act, which gives plaintiffs a cause of action under the Sherman Act, was in effect at the time that FTAIA was enacted, and FTAIA speaks explicitly of "giv[ing] rise to a claim under" the Sherman Act. The concept of a claim arising under the Sherman Act is clearly one that is present in the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. It is thus equally plausible to think that Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of "conduct," "effect," and "claim" the key to FTAIA. The view that FTAIA must be taken to refer only to defendants' conduct tends to ignore the fact that FTAIA does refer on its face to the conduct's effect giving rise to a claim, which arguably refers to a plaintiff's injury. Congress may well have imported a concept from the Clayton Act in amending the Sherman Act, notwithstanding appellants' and the Second Circuit's assumption of categorical precision on Congress' part.

The Second Circuit's heavy reliance on this argument led to its rather expansive holding to the effect that: "Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect

violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. According to the Second Circuit, "a violation of the Sherman Act is not predicated on the existence of an injury to a plaintiff. In fact, the only civil action that can be brought directly under the Sherman Act is one by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4." *Id.* at 399. The Second Circuit thereby held that violation of the Sherman Act is sufficient to meet the "gives rise to a claim" requirement of subsection 2. In the Second Circuit's view, the words "a claim" in FTAIA mean an action by the government, not a private claim. The Second Circuit justified this view in a footnote, with three arguments: that the definition of the words "a claim" does not exclude this meaning, *id.* at 400 (citing BLACK'S LAW DICTIONARY 240 (7th ed. 1999)); that FTAIA's specific reference to "a claim under the provisions of sections 1 to 7 of this title" means a claim brought *directly* pursuant to the Sherman Act, *id.*; and that Congress has not exclusively used the word "claim" to refer to a private action for damages, *id.* (citing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(3), which gives the FTC "the power to enforce the substantive provisions of the FTCA regardless of whether a plaintiff has suffered injury").

While we acknowledge that the words "a claim" do not necessarily exclude a government action, the usual meaning of "a claim" is a private action. Thus, unlike the Second Circuit, we do not think that violation of the Sherman Act is necessarily the same thing as "giv[ing] rise to a claim" under it. Furthermore, the concept of "giv[ing] rise to a claim" may well be a concept from the Clayton Act, which creates a private cause of action for Sherman Act violations. As noted above, we believe that, in order to satisfy FTAIA, a plaintiff must show that the anticompetitive conduct violates the Sherman Act and that the conduct's U.S. effect gives rise to someone's claim under it. As the Second Circuit itself noted,

"[t]he existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury. Conduct may violate the Sherman Act but not be actionable under section 4 of the Clayton Act because it did not cause injury." *Kruman*, 284 F.3d at 397 (citing *Indian Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989)). "The 'mere presence' of a per se violation under Sherman Act § 1 'does not by itself bestow on any plaintiff a private right of action for damages,' which is a 'gift of section 4 of the Clayton Act.'" II AREEDA & HOVENKAMP, *supra*, § 337c, at 313 (quoting *Indian Grocery*, 864 F.2d at 1419). And "while actual injury is required to seek treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff may bring an antitrust action seeking prospective injunctive relief under section 16 of the Clayton Act for conduct violating the Sherman Act without suffering an actual injury." *Kruman*, 284 F.3d at 397 (citing 15 U.S.C. § 26; *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969)). But the Sherman Act may be enforced by the government even when no private plaintiff claims actual or threatened injury. *See* 15 U.S.C. § 4 ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations.").

We hold that the words "a claim" in subsection 2 of FTAIA refer to a private action, not merely a government action to enforce the Sherman Act. In other words, "giv[ing] rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act. In the instant case, the conspiracy's U.S. effects did allegedly injure

and did give rise to the claim of some private entities—namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies.

4. Legislative History

Both appellants and appellees argue that FTAIA's legislative history supports their respective readings of the statute. Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce. This legislative history supports the less restrictive view of FTAIA's jurisdictional reach, consistent with the position advanced by appellants and endorsed by the Second Circuit. What is most noteworthy is that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue. This leads us to conclude that the legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured by the conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim.

Appellees argue that the following passage from the House Report demonstrates that Congress intended for the Sherman Act to apply only in cases where the plaintiff's injury arose from anticompetitive effect on U.S. commerce:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from

> conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language . . . to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. . . [I]t is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States. . . .

H.R. REP. NO. 97-686, at 11-12. This passage states that the U.S. "'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws," which is consistent with appellees' restrictive view that the plaintiffs' injury must arise from the conduct's U.S. effect. However, the sentences that immediately follow make clear that "it is sufficient that the conduct providing the basis of the claim has had the requisite impact on" U.S. commerce, which supports appellants' broader view of the statute's "gives rise to a claim" requirement. Indeed, the "[t]his does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States" language, which follows immediately after the discussion of the restrictive view, strongly suggests that Congress did not intend to exclude the less restrictive basis for subject matter jurisdiction under FTAIA.

Under the heading "Imports and Purely Foreign Transactions," the House Report states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. . . . [T]here should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or

> a domestic competitor. . . . It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 9-10. This passage also suggests that the restrictive view of the statute does not exclude the less restrictive interpretation. On the one hand, the antitrust laws do not extend to "wholly foreign transactions," such as a transaction between two foreign firms. On the other hand, when the passage is read as a whole, this restriction seems to be contemplated only where there is no "direct, substantial and reasonably foreseeable effect on domestic commerce." This implies that where there *is* such an effect, jurisdiction over foreign transactions is proper. This surely does not support appellees' view of the statute.

Parts of FTAIA's legislative history plainly support the broader view of the statute. For example, the House Report states that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction . . . must be of the type that the antitrust laws prohibit. . . . For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extra-territorial effect on him of a different kind.

H.R. REP. NO. 97-686, at 11. The focus here seems to be on whether the conduct's domestic effect violates the antitrust laws, rather than on whether the conduct's domestic effect gives rise to the plaintiff's claim. This passage suggests that the plaintiff need only allege that the defendant's conduct actually had an effect on the domestic market and that such effect violated the antitrust laws. But more tellingly, in the

course of explaining that a plaintiff whose "damage claim is based on an extraterritorial effect" cannot establish jurisdiction where the conduct has a "*beneficial* effect within the United States," the passage implicitly assumes that a plaintiff whose claim is based on a foreign effect *can* establish jurisdiction where the conduct has a *harmful* effect within the United States. This example addresses the situation in which the same conduct has both domestic and foreign effects, and clearly assumes that the plaintiff's claim does not arise from the conduct's U.S. effect. It specifies that the hypothetical beneficial U.S. effect could be "increased profitability of some other company or increased domestic employment," which obviously could not give rise to a claim under the antitrust laws. But significantly, this example does not assume that the fact that the claim arises from something other than the U.S. effect precludes subject matter jurisdiction. Rather, it is clearly the fact of the U.S. effect being beneficial—and therefore the absence of harmful effect under the "effect" prong—that would render jurisdiction improper. This passage thus suggests that the plaintiff can invoke jurisdiction where the anticompetitive conduct's U.S. effect does not give rise to the plaintiff's claim, as long as the conduct has a harmful, not beneficial, effect on U.S. commerce.

In another passage, the House Report states:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws.

> Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. REP. NO. 97-686, at 13. This suggests that Congress intended for subject matter jurisdiction to exist over the conduct of an international cartel that had an effect on domestic commerce, even if the plaintiff's claim does not arise from that domestic effect. Again, the focus for subject matter jurisdiction purposes here is on whether the defendant's conduct has "the requisite impact on United States commerce," rather than whether the plaintiff in particular was injured by that impact. This passage's example of a domestic export cartel, which presumably directs its anticompetitive conduct to foreign markets, but whose conduct also has a "'spillover' effect on commerce within this country" exemplifies this point, because such a cartel's conduct would give rise to claims by foreign and domestic plaintiffs. In understanding the conduct of such a cartel to be likely to "fall within the reach of our antitrust laws," nothing in this passage restricts that reach to suits *only* by the domestic plaintiffs injured by the conduct's spillover effects. Admittedly, nothing in this passage explicitly allows suits by plaintiffs injured abroad by a "world-wide shortage or artificially inflated world-wide price" rather than by the domestic spillover effects. But we think that given the clear concern here with the *conduct* that creates the world-wide shortage or price inflation that in turn creates domestic spillover effects, it would be counter-intuitive and arbitrary to read Congress to intend to limit jurisdiction to only the subset of claims brought by plaintiffs injured by the spillover effects of the conduct at issue. Since the same conduct injures both foreign plaintiffs and domestic plaintiffs, and it is clearly the conduct that Congress aims to reach with our antitrust laws, it is reasonable to read Congress as envisioning suits by any plaintiffs who would enable our antitrust laws to reach and deter that conduct.

The House Report makes this point explicit:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al. v. Government of India, et al.*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

Id. at 10. Explicitly envisioning recovery for plaintiffs who "suffer economic injury abroad," this passage seems to support appellants' less restrictive reading of the statute. But appellees point out that this passage, which seems to allow recovery by foreign plaintiffs injured abroad as long as the conduct has the "requisite domestic effects," also expressly states that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace" (emphasis added). This sentence suggests that foreign plaintiffs can sue under the antitrust laws for injury suffered in the domestic market. Arguably, this statement lends some support to appellees' restrictive view of the statute, but not much.

In sum, there is much in the legislative history that supports the *less restrictive view* of FTAIA's jurisdictional reach. There are isolated statements that are consistent with the restrictive view, but they are never offered to denigrate or exclude the less restrictive view of the statute. This is telling, we think, for if Congress intended to reject the less restrictive

view of FTAIA's jurisdictional reach, there was absolutely no reason to discuss this possible basis for subject matter jurisdiction along with the restrictive view. We therefore conclude that the less restrictive view of jurisdiction is consistent with a literal interpretation of § 6a(2), and this interpretation is perfectly consistent with the legislative history.

5. Deterrence

The Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), which was issued before Congress enacted FTAIA, is cited approvingly in the legislative history to FTAIA. *See* H.R. REP. NO. 97-686, at 10. *Pfizer* therefore may offer some clues as to Congress' intent in enacting FTAIA.

In *Pfizer*, the Supreme Court articulated policy reasons for holding that a foreign plaintiff was entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Noting that one purpose of § 4 of the Clayton Act is "to deter violators and deprive them of 'the fruits of their illegality,'" the Supreme Court reasoned that denying a foreign plaintiff injured by an antitrust violation the right to sue "would permit a price fixer or a monopolist to escape full liability for his illegal actions" and "would lessen the deterrent effect" of the antitrust laws. *See Pfizer*, 434 U.S. at 314-15 (citations omitted). Moreover,

> [i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of

> their conduct, American consumers are benefitted by the maximum deterrent effect of treble damages upon all potential violators.

Id. at 315.

On this deterrence logic, the Second Circuit in *Kruman* refuted the view that suits by domestic plaintiffs injured by a global conspiracy's domestic effects could adequately enforce our antitrust laws. The Second Circuit noted that, when a foreign anticompetitive scheme enhances the success of a domestic scheme, the perpetrator would have a greater incentive to pursue the global scheme, which would ultimately harm U.S. consumers if a plaintiff harmed only by the foreign effect of a global scheme had no U.S. remedy. *See Kruman*, 284 F.3d at 403 (citing *Pfizer*, 434 U.S. at 313-15). Judge Patrick Higginbotham's dissent in *Den Norske* similarly emphasized that allowing foreign plaintiffs to sue would protect U.S. consumers by deterring perpetrators from engaging in global conspiracies that harm U.S. markets. *See Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting). Judge Higginbotham, following *Pfizer*, reasoned that a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations. "Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred." *Id.*

We find this deterrence reasoning, drawn from *Pfizer*, and amplified in Judge Higginbotham's opinion in *Den Norske*, most compelling. The less restrictive interpretation of the "gives rise to a claim" language of FTAIA, allowing suits by foreign plaintiffs injured by the foreign effects of a global conspiracy, serves "the United States' narrow interest in vigorous domestic competition" better than the restrictive interpretation disallowing such suits. *Id.* at 438-39. *Pfizer*'s

concern was that denying a foreign plaintiff injured by an antitrust violation a remedy under our antitrust laws would permit a price fixer to escape full liability for his conduct, which would lessen the deterrent effect of the antitrust laws. This concern applies squarely to this case. Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce. Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy. Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.

Even assuming, *arguendo*, that the antitrust laws are only intended to protect selfish national interests, suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies. This reasoning is also supported by FTAIA's legislative history, which notes: "As the Supreme Court pointed out in *Pfizer*, . . . to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. REP. NO. 97-686, at 10.

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if

the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy. We think that *Pfizer* supports this view and that the citation to *Pfizer* in the legislative history of FTAIA suggests that Congress meant to endorse it as well.

6. Conclusion on Subject Matter Jurisdiction

On the basis of the foregoing, we conclude that the less restrictive view of FTAIA's jurisdictional reach, allowing subject matter jurisdiction in this case, is what Congress meant to achieve. The District Court erred in dismissing the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, since under the less restrictive interpretation, the foreign plaintiffs can establish that the global conspiracy's "direct, substantial, and reasonably foreseeable effect" on domestic commerce "gives rise to a claim" under the antitrust laws.

B. Standing

Appellees contend that, even if subject matter jurisdiction is proper, the case should nonetheless be dismissed because the foreign purchasers lack standing. Because the District Court concluded that it lacked subject matter jurisdiction over the foreign plaintiffs' claims, it declined to address the standing issue. Although the District Court did not rule on the issue, it was fully presented below, as well as before this court. Appellants ask this court to remand the case so that the District Court may examine the issue in the first instance, or alternatively, to find that they have standing.

While the District Court's failure to rule on the issue of standing "might be thought to warrant a remand, so that the district court [may] consider the matter in the first instance, the Supreme Court has instructed the courts of appeals to decide for themselves whether the party seeking judicial review has standing, even if the issue was not decided below. . . ." *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 82 (D.C. Cir. 1991) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)). We are thus "required to address the issue [of standing] even if the courts below have not passed on it. . . ." *FW/PBS*, 493 U.S. at 230 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ." *FW/PBS*, 493 U.S. at 231 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))).

To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing." *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)). The foreign purchasers have constitutional standing. They allege that they suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants. This injury was allegedly caused by defendants' conspiracy to fix vitamin prices around the world. There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.

In addition, an antitrust plaintiff must establish "antitrust injury," that is, "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA*

Petroleum Co., 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Appellees argue that the plaintiffs' injuries "are not 'injury of the type the antitrust laws were intended to prevent,' because those laws do not forbid the fixing of prices in the markets in which Plaintiffs purchased vitamins, but only in U.S. commerce." Appellees' Br. 42 (citation omitted). We disagree.

In this case, plaintiffs allege that the defendants engaged in a global conspiracy that had an effect on U.S. and foreign commerce. The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce. *See, e.g., Laker Airways*, 731 F.2d at 922 ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *Alcoa*, 148 F.2d at 443-44; *cf. Pfizer*, 434 U.S. at 314 ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations."). Thus, the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms U.S. commerce. Where defendants' global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.

In *Brunswick*, the Supreme Court explained that, to establish "antitrust injury," the injury should be "'the type of loss that the claimed violations'" of the Sherman Act "'would be likely to cause.'" *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)). The foreign purchasers of vitamins here were injured by conduct that violated the Sherman Act—a global price-fixing conspiracy. The foreign plaintiffs' paying of inflated prices in foreign commerce was loss of the type that violation

of the Sherman Act would be likely to cause. Moreover, the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here. The foreign purchasers' injury therefore must be deemed to be "of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's conduct unlawful." *Brunswick*, 429 U.S. at 489. Appellants can therefore establish "antitrust injury."

In addition, we must consider the following additional *Associated General Contractors* factors to determine whether appellants are "proper plaintiffs": "the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Andrx Pharms.*, 256 F.3d at 806 (citing *Associated Gen. Contractors*, 459 U.S. at 542-45). The foreign plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants' alleged conspiracy to inflate prices. The injury is direct and the claim for damages is not speculative. Allowing the foreign plaintiffs to sue does not risk duplicative recovery or complex damage apportionment.

Appellees finally argue that "there is a large body of 'more appropriate plaintiffs,'" namely the "[h]undreds of U.S. plaintiffs, as well as a class of domestic purchasers," who have sued the defendants. Appellees' Br. 44. But these domestic plaintiffs have not been harmed more directly by the foreign effects of the conspiracy than the foreign purchasers, and appellees do not suggest that the domestic plaintiffs can seek to recover for the same injury that the foreign plaintiffs suffered. The domestic plaintiffs are not more direct victims

of defendants' conduct than the foreign plaintiffs, since the foreign plaintiffs have been injured just as directly as the domestic plaintiffs as a result of the defendants' conduct. Furthermore, for the reasons already explained, the foreign plaintiffs play an important role in the deterrence of the global conspiracy, a role that cannot be filled adequately by the domestic plaintiffs alone. Therefore, the foreign plaintiffs are proper plaintiffs to bring suit in this case.

We conclude that the foreign plaintiffs in this case have standing to bring their federal antitrust claims.

C. Supplemental Jurisdiction

Appellants contend that, after the District Court dismissed the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, it erred in declining to exercise supplemental jurisdiction over the foreign plaintiffs' foreign law claims pursuant to 28 U.S.C. § 1367. Appellants argue that "the district court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act, and consequently, should have exercised supplemental jurisdiction over the claims of the foreign plaintiffs." Appellants' Br. 27-28.

This court reviews the District Court's decision not to exercise supplemental jurisdiction for abuse of discretion. *See Diven v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994). 28 U.S.C. § 1367 provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367. Under 28 U.S.C. § 1367, "the District Court has supplemental jurisdiction over related claims when it has original jurisdiction over the initial claim." *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 346

(D.C. Cir. 1997). "When the District Court has dismissed claims properly before it, it retains discretion to decide whether or not to dismiss other claims as to which it may exercise supplemental jurisdiction." *Id.* The District Court "may decline to exercise supplemental jurisdiction over a claim" if, for example, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). But "[i]f the district court dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction." *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997).

When the District Court dismissed the foreign plaintiffs' underlying federal antitrust claim on jurisdictional grounds, it had no discretion to exercise supplemental jurisdiction at all over the foreign plaintiffs' foreign law claims. Appellants' assumption that the District Court's remaining jurisdiction over the *domestic* plaintiffs' claims can serve as the basis of supplemental jurisdiction over the foreign plaintiffs' foreign law claims is implausible, and appellants cite no cases to support this assumption. When the District Court dismissed the foreign plaintiffs' claims on jurisdictional grounds, the remaining original jurisdiction over the domestic plaintiffs' claims was irrelevant to the exercise of supplemental jurisdiction over the foreign plaintiffs' foreign law claims. The dismissal of the foreign plaintiffs' federal antitrust claims on jurisdictional grounds precluded the District Court from exercising supplemental jurisdiction over any of the foreign plaintiffs' additional claims over which the court did not have original jurisdiction.

We recognize that the District Court has already articulated reasons that counsel against exercising supplemental jurisdiction, such as comity, efficiency, and the novelty and complexity of the issues of foreign law involved. The posture of the case has now changed, however, because we reverse the District Court's decision on subject matter jurisdiction

and vacate its judgment against appellants. On remand, the District Court will have original jurisdiction over the foreign plaintiffs' federal antitrust claims. Therefore, the District Court must consider anew whether to exercise its discretion to accept supplemental jurisdiction over the foreign plaintiffs' foreign law claims. But the District Court still retains discretion to decline to exercise supplemental jurisdiction over the foreign law claims pursuant to 28 U.S.C. § 1367.

III. Conclusion

For the reasons stated above, we reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

I disagree with the majority's interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, and, consequently, with its disposition of this appeal.[1] The majority decides whether a court has jurisdiction over claims asserted by a plaintiff in one action by reference to a hypothetical claim another party could, perhaps, raise in some other proceeding. This seems a peculiar notion. The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), under which the phrase "gives rise to a claim" refers to the claim advanced by the plaintiff in the action before the court. This reading, to me, reflects the Congress's "unambiguously expressed intent" under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is also consistent with the legislative history that the majority cites.

The Fifth Circuit's narrower construction is unambiguously supported by the House Report's declaration that "the 'effect' providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws." H.R. Rep. 97-686, at 11-12 (emphasis added); *see* maj. op. at 23-24. The plain meaning of this statement is not undercut, as the majority contends, by the two sentences that follow; they simply explain that, so long as "the basis of the claim has had the requisite impact on the domestic or import commerce of the United States,"[2] the claim does not fail simply because "the impact of the illegal conduct" is not "experienced by the

[1] I nonetheless agree with the majority's determination that the district court lacked discretion to exercise supplemental jurisdiction once it had dismissed all of the appellants' claims under United States law. *See* maj. op. at 34-36.

[2] Notably, the word "claim" in the quoted language refers to the specific claim asserted by the injured party.

injured party within the United States." H.R. Rep. No. 97-686, at 12; *see* maj. op. at 24. Another excerpt the majority quotes similarly explains that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do" so long as "the conduct has the requisite effects within the United States, even if some purchasers *take title* abroad or *suffer economic injury* abroad." *See* H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 27) (emphasis added). Taken together, these two excerpts make clear that neither the situs of the injury nor the nationality of the claimant is jurisdictionally dispositive so long as there is a sufficient domestic impact or effect to satisfy subsection (1) of the FTAIA. Neither excerpt purports to eliminate the requirement in subsection (2) that such domestic impact give rise to the claimed injury wherever and by whomever felt. Other of the majority's citations likewise relate to the first prong of the jurisdictional test, in subsection (1), and so are of no assistance in construing the second prong of the test set out in subsection (2). *See* maj. op. at 24-26 (quoting H.R. Rep. No. 97-686, at 9-10, 11, 13). Finally, the Report expressly relies, as the majority observes, on the United States Supreme Court's decision in *Pfizer v. Government of India*, 434 U.S. 308 (1978), but only for the broad proposition that "[t]o deny foreigners a recovery could *under some circumstances* so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 30) (emphasis added). The Report does not suggest the deterrence policy discussed in *Pfizer* justifies expanding jurisdiction beyond the limits expressed in subsection (2) of the FTAIA.

Finally, I believe that our decision in *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), cannot be construed to support the majority's interpretation of the FTAIA. As a textual matter, the

court in *Caribbean* addressed only subsection (1) of the FTAIA, with nary a mention of subsection (2). Even were we to presume that the court *sub silentio* considered the second prong of the jurisdictional test, the plaintiffs' allegations plainly show that, notwithstanding the majority's contrary assertion, *see* maj. op. at 14, the alleged domestic effect did in fact give rise to the foreign plaintiff's anti-trust claim. In *Caribbean Broadcasting* the court found the foreign plaintiff had adequately alleged that (1) the defendants engaged in "anticompetitive conduct"—"namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to protect their monopoly" over FM radio advertising in "the market for English-language radio broadcast advertising in the Eastern Caribbean"; (2) "U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising because of the unlawful actions of [the defendants]"; and (3) the foreign plaintiff "was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [the defendant radio broadcaster]." 148 F.3d at 1087. Thus it is clear that the defendants' fraudulent anticompetitive conduct had the effect of causing U.S. companies to advertise only with the defendants and that this effect gave rise to the foreign plaintiff's claim for lost customers.

In sum, because I believe that the plain language in subsection (2) of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT
SEPTEMBER TERM, 2003

[Filed September 11, 2003]

No. 01-7115

EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

BEFORE: EDWARDS, HENDERSON AND ROGERS, *Circuit Judges*

ORDER

Upon consideration of appellees' petition for rehearing filed February 19, 2003, the supplement thereto, and the responses, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ _____
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT
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EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

BEFORE: GINSBURG, *Chief Judge*, AND EDWARDS, SENTELLE,* HENDERSON,* RANDOLPH,* ROGERS, TATEL, GARLAND,** AND ROBERTS,** *Circuit Judges*

ORDER

Appellees' petition for rehearing en banc, the supplement thereto, and the responses have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

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* Circuit Judges Sentelle, Henderson, and Randolph would grant the petition for rehearing en banc.

** Circuit Judges Garland and Roberts did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 00-1686 (TFH)

EMPAGRAN S.A., *et al.*,
Plaintiffs,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Defendants.

HOGAN, *District Judge*

MEMORANDUM OPINION

Pending before the Court is the Joint Motion of Certain Defendants to Dismiss the Amended Class Action Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[1] Upon careful consideration of defendants' Joint Motion to Dismiss, plaintiffs' opposition,

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[1] The Joint Motion to Dismiss was filed by defendants Hoffman-La Roche, Inc., Roche Vitamins, Inc., BASF Corporation, Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc, Inc., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals, Inc., Eisai USA, Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Lonza Inc., Bioproducts Inc., Degussa-Huls Corporation, EM Industries, Inc., Mitsui & Co., Ltd., Nepera, Inc., Reilly Industries, Inc., Sumitomo Chemical America, Inc., Tanabe USA, Inc., and UCB Chemicals Corporation. This Motion has also been adopted by Chinook Group, Ltd., Cope Investments Ltd., DuCoa, L.P., DCV, Inc., UCB S.A., Eisai Co., Ltd., Hoechst Marion Roussel, S.A., Rhone-Poulenc S.A., Sumitomo Chemical Co., Ltd., Degussa AG, Merck KgaA, E. Merck, F. Hoffman-La Roche, Ltd., BASF Aktiengesellschaft, Lonza AG, Alsuisse Group Ltd., and Lonza Inc.

defendants' reply, the arguments presented at the May 23, 2001 hearing, the Sumitomo defendants' post-hearing submission, the Empagran plaintiffs' reply to the Sumitomo brief, and the entire record herein, this Court will grant the Joint Motion to Dismiss with respect to the foreign plaintiffs' federal antitrust claims and defer ruling on the Motion with respect to the domestic plaintiffs' federal antitrust claims pending the domestic plaintiffs' supplementation of their factual allegations with respect to the jurisdictional and standing issues. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Complaint.

I. BACKGROUND

Plaintiffs in this case represent foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine, as well as two United States corporations—The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. headquartered in Ohio. Plaintiffs are seeking damages and injunctive relief under the antitrust laws of the United States, the antitrust laws of the relevant foreign nations, and international law for defendants' alleged conspiracy to fix prices, allocate market shares, and commit other unlawful practices "designed to inflate the prices of various vitamins sold to plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1.

Plaintiffs propose to bring this action on behalf of themselves and as representatives of the following classes: (1) domestic purchasers, that is, "all persons or entities domiciled in the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 to February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators, and their respective subsidiaries and affiliates"; and (2) foreign purchasers, that is, "all persons and

entities domiciled outside the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 through February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators and their respective subsidiaries and affiliates." *Id.* at ¶ 96.

II. DISCUSSION

In their Joint Motion to Dismiss, defendants make the following arguments for dismissal: (1) this Court lacks subject matter jurisdiction under the federal antitrust laws to remedy plaintiffs' injuries, because the injuries they seek to redress were allegedly sustained in transactions that lack any direct connection to U.S. commerce; (2) plaintiffs lack standing under the federal antitrust laws to assert their claims because they seek to remedy injuries sustained outside United States commerce and thus fall outside the class of persons whom the Sherman Act is designed to protect; (3) the claims of the domestic plaintiffs are duplicative of claims previously asserted in another action pending in our Court in the *Vitamins Antitrust Litigation* and should thus be dismissed; and (4) the Court should decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims and should dismiss plaintiffs' claims for violations of customary international law for failure to state a claim upon which relief may be granted.

A. Subject Matter Jurisdiction

Defendants argue that this Court lacks subject matter jurisdiction over plaintiffs' claims and plaintiffs have failed to state a claim under the federal antitrust laws, because plaintiffs have not alleged that their injuries were sustained in U.S. commerce as the direct, substantial, and reasonably foreseeable results of anti-competitive conduct by the defendants. Jt. Mot. at 4. Plaintiffs, on the other hand, contend that their allegations of a "global" conspiracy that

operated domestically as well as internationally suffice to state a federal antitrust claim and establish this Court's jurisdiction over the Amended Complaint.

The critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws. The Sherman Act has been held to reach conduct abroad only if the conduct was intended to have, and did have, significant effects within the United States. *Kruman v. Christie's Internat'l PLC*, 129 F. Supp. 2d 620, 624 (S.D.N.Y. 2001); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). In fact, in 1982, Congress enacted the Foreign Trade Antitrust Improvements Act ("FTAIA") for the purpose, among others, of "exempt[ing] from the United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities abroad." *Id.* The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations" and "such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section." 15 U.S.C. § 6(a). Therefore, under federal antitrust law, to establish subject matter jurisdiction over this action, plaintiffs must allege that the conduct

causing their injuries resulted in a "direct, substantial, and reasonably foreseeable effect on U.S. commerce." *Kruman*, 129 F. Supp. 2d at 625. In addition, plaintiffs must also allege that the injuries they seek to remedy "arise" from an anticompetitive effect of defendants' conduct on U.S. commerce. *Id.* In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *Id.* Given these standards, the Court would certainly have jurisdiction to provide redress for injuries suffered in consequence of overt acts in furtherance of the conspiracy, such as the imposition of fixed prices, that occurred in the United States, because those acts would both have occurred and have had effects here; but this Court would only have jurisdiction over plaintiffs' alleged injuries, which were suffered in consequence of overt acts that occurred outside this country, if those acts, either individually or perhaps collectively had direct, substantial and reasonably foreseeable effects within the United States that caused the injuries seeking redress here. *Id.* at 625-26.

The problem here is that although plaintiffs generally allege that the defendants' price fixing behavior had direct, substantial, and reasonably foreseeable effects on U.S. commerce, see Amend. Compl. ¶¶ 1-4 (describing defendants' conspiratorial and price fixing actions both within the United States and abroad, including meetings and agreements among the defendants, many of which took place within the United States), they propose to bring this action only on behalf of domestic and foreign purchasers who directly purchased Class Vitamins from defendants or their co-conspirators "for delivery outside the United States." Plaintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case. Plaintiffs argue that the jurisdictional nexus is provided solely by the global nature of the defendants' conduct. In plaintiffs' view, the territorial effect of that conduct is irrelevant.

However, the existing caselaw does not support plaintiffs' position. *See, e.g.*, *Kruman*, 129 F. Supp. 2d at 626-27 (dismissing complaint for lack of subject matter jurisdiction despite the fact that "meetings in which the conspiracy was formed or continued and acts in furtherance of the conspiracy occurred both in the United States and elsewhere," where conduct that allegedly injured plaintiffs "took place abroad"); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) ("actionable aspect" of anticompetitive restraint is not location of the alleged anticompetitive conduct, but an "anticompetitive effect upon American commerce"); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000) (holding that plaintiff injured as a result of defendants' manipulation of the London Metal Exchange could not rely on defendants' conduct in the United States to establish subject matter jurisdiction: "it is irrelevant that some of defendants' conduct took place in the United States. It was not the conduct in the United States that caused plaintiffs' injuries"); *McElderry v. Cathay Pac. Airways Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988) ("[A]n anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless whether there was anticompetitive conduct in the United States."). Allegations of a worldwide conspiracy do not suffice under the applicable caselaw to establish the necessary direct, substantial and reasonably foreseeable effect on U.S. commerce required to establish this Court's jurisdiction. *See e.g.*, *Lantec, Inc. v. Novell*, No. 2:95-CV-97-ST 2000 U.S. Dist. LEXIS 19905, at *18 (D. Utah, Sep. 15, 2000) (rejecting contention by foreign plaintiffs that subject matter jurisdiction exists under the FTAIA when injuries suffered in foreign markets are "inextricably intertwined" with injuries inflicted on the domestic market," because plaintiffs failed to allege that defendants' "actions toward the [plaintiffs] had a substantial effect on the domestic market"); *Kruman*, 129 F. Supp. 2d at 625-26 (rejecting argument that transnational nature of

auction market was sufficient to establish court's jurisdiction, because relevant conduct for purposes of measuring U.S. effects was not the "transnational price fixing conspiracy" but rather "[t]he precise acts that caused injury," *i.e.* "the imposition of charge for auction services at levels determined or affected by the illicit agreement" and although "[s]ome of those acts occurred here . . . [s]ome—those of which plaintiffs in these cases complain—took place abroad"); *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420, 428 (5th Cir. 2001) (holding that court lacked subject matter jurisdiction over plaintiff's claim, despite the fact that plaintiff had alleged that the market allocation scheme had affected the price for heavy-lift barge services in the Gulf of Mexico, because the allegedly anticompetitive prices charged for heavy-lift barge services in the Gulf of Mexico did not "give rise to" the plaintiff's claim, which was based on injuries sustained in purchasing heavy-barge services in the North Sea).

Plaintiffs argue that Congress intended only to limit recovery under the FTAIA to conduct that had some domestic effect and that it did not intend to limit the Court's jurisdiction to cases where plaintiffs' injuries involved those domestic effects. To support this assertion, plaintiffs contend that by using the word "unless" rather than "except to the extent that" when referring to the domestic effects requirement, Congress allowed the entire range of conduct with some domestic effect to be actionable, and did not limit courts to injuries tied to these effects.[2] However, plaintiffs

[2] Plaintiffs make a similar argument with respect to the legislative history of the FTAIA, which makes the Sherman Act applicable "if" the alleged restraints on export trade have a direct and substantial effect on U.S. commerce. Plaintiffs argue that if Congress had intended to make the FTAIA applicable only to particular injuries with these domestic effects, it would have said that jurisdiction exists "to the extent that" or "insofar as" the requisite U.S. effects are found, rather than "if" the requisite effects are found.

cite no caselaw to support this argument and the caselaw cited by defendants strongly refutes this contention. Moreover, the Court is not convinced that "if" and "to the extent that" carry such a different meaning in the context of this statute. Plaintiffs' brief relies almost exclusively on these types of linguistic arguments, as well as several quotations from the dissents of cases cited by defendants.

In fact, plaintiffs acknowledged at the May 23, 2001 hearing that no court has ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case; however, plaintiffs contend that fairness necessitates that this Court expand the scope of the U.S. antitrust laws in order to compensate plaintiffs for defendants' acknowledged wrongdoing. While the Court understands that some, although not all, of these defendants have pled guilty to price fixing activities in violation of United States antitrust laws, the Court cannot expand the scope of the law in order to satisfy these fairness concerns. Plaintiffs may indeed have a remedy against these defendants abroad. However, the issue here is not whether these defendants are in fact guilty of the conduct alleged but whether this Court has jurisdiction over the plaintiffs' claims. Given the state of the law at the present time, the Court cannot find that it has jurisdiction over the foreign plaintiffs' federal antitrust allegations in this action. Therefore, the Joint Motion to Dismiss the foreign plaintiffs' claims brought under federal antitrust laws is granted for lack of subject matter jurisdiction.

However, the Court's ruling with respect to the claims of the foreign plaintiffs does not resolve the issue of whether this Court has jurisdiction over the allegations of The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co., the two domestic plaintiffs in this action. Subject matter jurisdiction may exist over the proposed domestic purchaser class' claims if they purchased the vitamins in interstate

commerce, regardless of the fact that they planned to deliver these vitamins abroad. *See Carpet Group Internat'l v. Oriental Rug Importers Assoc.*, 227 F.3d 62, 75-76 (3d Cir. 2000) ("because the plaintiffs have introduced evidence sufficient to show that the challenged conduct actually occurred in interstate commerce, we conclude that subject matter jurisdiction exists over plaintiffs' Sherman Act claims"). It is unclear from the face of the Amended Complaint whether the purchases at issue with respect to the domestic plaintiffs were made within the United States or abroad. The Amended Complaint says that the Procter & Gamble Co. "suffered injury in the United States," *see* Amend. Compl. at ¶ 22, but no similar allegation is made with respect to The Procter & Gamble Manufacturing Co.; instead with respect to the latter United States company, the Amended Complaint merely states that P&G Manufacturing purchased vitamin B5 from certain defendants or their co-conspirators "for use in foreign countries." *Id.* at ¶ 19. Therefore, the Court will require Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. to supplement their Amended Complaint to provide more detailed factual allegations with respect to how defendants' conduct caused injuries to these two plaintiffs in United States commerce.

B. Standing

Defendants also contend that plaintiffs lack standing in this case, because they have not been injured in United States commerce and therefore fall outside the class of persons whom the Sherman Act is designed to protect. *See* Jt. Mem. at 19-20 (citing, among other cases, *The 'In' Porters, S.A. v. Hanes Printables, Inc.* 663 F. Supp. 494, 499 (M.D.N.C. 1987) ("[T]he concerns of the antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers."")). By contrast, plaintiffs maintain that they have standing here because their alleged injuries occurred in a global market, which necessarily includes

United States commerce. *See* Pl's Opp. at 19 (citing, among other cases, *Transnor (Bermuda) Ltd. v. BP North Am. Petroleum* ("*Transnor II*"), 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990) ("foreigners have standing to sue under the U.S. antitrust laws if the alleged course of anticompetitive conduct has the requisite impact on U.S. commerce")). Because this Court has concluded that it lacks subject matter jurisdiction over the foreign plaintiffs' claims, it need not resolve the standing issue with respect to these plaintiffs. However, because the Court conceivably may have subject matter jurisdiction over the two domestic plaintiffs' claims, it will address standing with respect to the domestic plaintiffs.

Generally, in order to determine whether a plaintiff has antitrust standing, courts consider the following factors: (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff; (2) the directness of the asserted injury; (3) the risk of duplicative recoveries; (4) the existence of other, more appropriate, plaintiffs; and (5) whether the antitrust laws were designed to provide redress for plaintiffs' injury. *See Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 537-46, 74 (1983). The fifth factor is especially important to an antitrust claim, because "a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). For a plaintiff to have suffered an antitrust injury, the Court must determine that the plaintiff "was injured in the relevant market." *De Atucha v. Commodity Exch. Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985). For "purposes of standing, the relevant market must be the domestic market." *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. 97-3257, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997); *see also Transnor II*, 738 F. Supp. at 1476 ("[O]nly persons or corporations injured while trading in U.S. foreign or domestic

commerce have standing" to bring Sherman Act claims). "Congress did not intend recovery under the antitrust laws by an individual who traded and was injured entirely outside of United States commerce." *Galavan*, 1997 WL 732498, at *4 (quoting *De Atucha*, 608 F. Supp. at 518); *see also In re Microsoft Corp. Antitrust Litig.*, 2001 WL 119908, at *13 (D. Md. Jan. 12, 2001) ("a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA").

In this case, plaintiffs allege generally that they have sustained injuries as a direct result of purchases and sales abroad during defendants' worldwide conspiracy to fix prices and exercise global market power over vitamins products. Despite the domestic plaintiffs' nationality, defendants contend that these plaintiffs lack standing because of the foreign nature of their transactions. *See Microsoft*, 2001 WL 118908, at *13 ("The critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated."). The Amended Complaint does not provide sufficient detail with respect to the transactions involving the two United States plaintiffs, so it is unclear whether or not they were competitors or consumers in the U.S. domestic market.[3] Again, the issue is whether these plaintiffs have traded and were injured within or entirely outside of United States commerce. *See De Atucha*, 608 F. Supp. At 518 ("Congress did not intend recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce."). The Court cannot resolve the standing issue with respect to the domestic plaintiffs until it

[3] The Amended Complaint does state that P&G suffered injury in the United States; however, there is no similar allegation made with respect to the other United States corporation, P&G Manufacturing. Moreover, the allegations with respect to even the former plaintiff are too general and conclusory and require additional detail before this Court can resolve the standing question.

receives their submissions further detailing where their alleged injuries occurred. Therefore, the Court will reserve decision on standing with respect to Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. pending the additions to the Amended Complaint on this issue.

C. Duplicity of Domestic Plaintiffs' Claims

Defendants argue that the two domestic plaintiffs in this case, Procter & Gamble Co. and The Procter & Gamble Manufacturing Co., should be dismissed from this action because they are already parties to *The Procter & Gamble Co., et al. v. BASF Aktiengesellschaft, et al.*, a case originally filed in the Southern District of Ohio and subsequently transferred by the Multi-District Litigation Panel to, and currently pending before, this Court as part of the *In re: Vitamins Antitrust Litigation*. According to defendants, the Ohio lawsuit is premised on the same basic factual allegations as this action and similarly seeks damages in connection with vitamins purchased for delivery abroad. Therefore, defendants reason, the Court should follow the "first-to-file" rule and dismiss the two domestic plaintiffs' claims in this action as duplicative. *See e.g., Washington Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirming dismissal of duplicative action and noting that "for more than three decades the rule in this circuit has been that, '[w]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is allowed to proceed to its conclusion first. . . .'") However, plaintiffs contend that the claims in this case are not identical to those asserted in the Ohio suit; in fact, according to plaintiffs, the Ohio lawsuit pertains only to domestic sales, while this action deals exclusively with foreign commerce. *See* Pl's Opp. at 36 ("The amended complaint in *P&G v. BASF* references international

activities and sales by way of background, but it does not purport to assert claims based upon sales of vitamins for delivery overseas.").

After reviewing the allegations in the Ohio lawsuit and the instant action, the Court finds that plaintiffs are correct that dismissal would not be appropriate on duplicity grounds because plaintiff is not asserting the same claims in two separate actions. *See P&G v. BASF* First Amended Compl. (Def's Exh. A). In addition, plaintiffs are also correct that the first-to-file rule would not apply here because the claims are pending in two cases in this court rather than in two different courts[4]; therefore, to the extent that the claims could be found to belong in one action, consolidation rather than dismissal would be the appropriate result. *See Miller Brewing Co. v. Meal Co., Ltd.*, 177 F.R.D. 642, 644-45 (E.D. Wis. 1998) (holding that "when both cases are pending in the same district—let alone the same judge—consolidation is preferable"); *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) ("When a court learns that two possibly duplicative actions are pending on its docket, consolidation may well be the most administratively efficient procedure. If the second complaint proves to contain some new matters, consolidation —unlike dismissal of the second complaint without prejudice or staying the second action—will avoid two trials on closely related matters."). The Court will reserve decision on the

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[4] Although the case was originally transferred to this Court only for pretrial proceedings, the parties to that case have subsequently entered into a stipulation that dictates that the case will be "treated for all purposes as if it has been transferred to the D.C. Court pursuant to 28 U.S.C. § 1404(a) and shall not be remanded for trial. . . ." 1/26/01 Stip. and Ord. Re: Personal Jurisdiction and Refiling of Actions ¶ 2. However, according to defendants, the Stipulation does not involve all defendants so the domestic P&G plaintiffs' claims may not be so easily consolidated with this action.

issue of consolidation pending the Court's rulings on subject matter jurisdiction and standing with regard to these domestic plaintiffs.[5]

D. Plaintiffs' Claims Under Foreign and Customary International Law

Defendants argue that even if this Court concludes that it has original jurisdiction over any of plaintiffs' claims, it nevertheless should decline to exercise supplemental jurisdiction over plaintiffs' claims under the "competition laws of the relevant foreign nations." Jt. Mot. at 27. Accordingly, defendants contend that Count Two should be dismissed. Additionally, defendants contend that Count Three should be dismissed because plaintiffs' claims for violations of customary international law do not state a claim upon which relief can be granted.

On the other hand, plaintiffs contend that this Court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act and consequently this Court may exercise supplemental jurisdiction over the claims of the foreign plaintiffs. Moreover, plaintiffs claim that the Alien Tort Claims Act, 28 U.S.C. § 1350, permits a foreign plaintiff to bring an action in a United States federal court for torts in violation of international law.

1. Foreign Law Claims

Title 28 of the United States Code, section 1367, grants district courts jurisdiction to hear claims within the "same case or controversy." 28 U.S.C. § 1367. The standard for supplemental jurisdiction is whether the claims "derive from

[5] Since the Court is dismissing the claims brought by the foreign plaintiffs, it may be more practical for the domestic plaintiffs to consolidate their claims into the Ohio action currently pending before the Court; should the parties agree to consolidation, they should notify the Court as soon as possible.

a common nucleus of operative fact." *United Mine Workers of America v. Gibbs*, 86 S. Ct. 1130, 1138 (1966). The scope of supplemental jurisdiction has been applied to domestic and foreign claims in addition to state and federal claims. *See, e.g., Ortman v. Stanray Corp.*, 371 F.2d 154 (7th Cir. 1967) (holding that doctrine of ancillary jurisdiction applied to determine if district court had jurisdiction to hear claims of foreign patent infringement where court had undisputed jurisdiction to hear claim of U.S. patent infringement arising out of same activities).

However, 28 U.S.C. § 1367(c) enumerates several bases for declining to exercise supplemental jurisdiction: (1) the claim raises a novel or complex issue of law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c)(1)-(c)(4).

Plaintiffs contend that this Court should exercise supplemental jurisdiction over these foreign law claims in order to reduce the inefficiency and redundancy that will occur if the foreign plaintiffs are forced to litigate identical claims and issues in numerous courts around the world. Pl's Opp. at 34. However, both parties appear to agree that there are already a number of lawsuits pending "in numerous jurisdictions around the world," *see* Pl's Opp. at 34 (quoting Motion of Certain Defendants for a Protective Order Concerning Plaintiffs' Requests for Merits Discovery). Therefore, it is unclear how this action would reduce the number of suits or increase efficiency. This Court would certainly lack the power to order that the other actions be dismissed or consolidated; and, given the first-to-file rule, it would seem that this action should be dismissed as duplicative of the other actions since it was presumably filed after these actions. In

any case, it would be more efficient and in the best interests of comity to allow the foreign courts to adjudicate the claims arising out of alleged violations of their own laws. Since these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction, and there are comity and efficiency reasons for declining to exercise supplemental jurisdiction over the foreign law claims in this case, the Court will decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims. *See*, *Microsoft*, 2001 WL 118908, at *11 n.8 (declining to exercise any supplemental jurisdiction over foreign law claims). Accordingly, defendants' Joint Motion to dismiss Count Two of the Amended Complaint is granted.

2. Plaintiffs' Claims for Violations of Customary International Law

Defendants also argue for dismissal of the foreign plaintiffs' claims brought under customary international law for failure to state a claim upon which relief may be granted. In order to establish a right to recover damages for violations of customary international law, plaintiffs must show: (1) that there exists a customary international law proscribing the conduct of which they complain and (2) that the law applies to private citizens and not only to state action.

Customary international law is based primarily on "customs and usages of civilized nations, treaties, and other interstate agreements, the decisions of international tribunals, and the decisions of national tribunals." 48 C.J.S. International Law § 5; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). While plaintiffs are correct that the "'law of nations' is not stagnant and should be construed as it exists today among the nations of the world." Pl's Opp. at 26 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)), courts have held as recently as this year that "no antitrust claim based on

customary international law has been recognized by a U.S. court." *Microsoft*, 127 F. Supp. 2d at 717 ("It is true that competition policy has been widely discussed on a global level. However, the international agreements regarding antitrust law that the foreign plaintiffs identify are voluntary and lack enforcement mechanisms. The dearth of enforceable international antitrust law highlights the inability of the international community to reach a consensus on competition policy. . . . Without general agreement on standards of international antitrust law, there can be no customary international law of antitrust. Therefore, plaintiffs' claim under customary international law fails."); *see also Kruman*, 129 F. Supp. 2d at 627 (rejecting a similar claim and noting that "[p]laintiffs' position, which only recently was rejected in the *Microsoft* case borders on the frivolous. . . . There is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to a tort claim on behalf of victims").

Plaintiffs cite no caselaw establishing a customary international law of antitrust.[6] Given the absence of any authority establishing such a cause of action, the Court cannot find that there exists a customary international law proscribing the conduct of which plaintiffs complain in this action. Therefore, it is unnecessary for the Court to reach the issue of whether

[6] Plaintiffs may be correct that the future of global antitrust policy could be in favor of a customary international law proscribing the type of conduct alleged here; certainly, there is some evidence that such an international consensus may be needed in today's world of global economies. However, the law has not yet evolved to this point. A single United States district court cannot enact such an international agreement where none exists. Therefore, although plaintiffs may have predicted the future of the law, they have not stated a cause of action under present international law.

the law requires state action. Accordingly, Count Three of the Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted.

III. CONCLUSION

For the foregoing reasons, defendants' Joint Motion to Dismiss the federal antitrust claims in the Amended Class Action Complaint brought by the foreign plaintiffs is granted. In addition, The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. will supplement their federal antitrust allegations in the Amended Complaint to provide further detail on the location of the domestic plaintiffs' injuries and the effect of the defendants' conduct, which caused these injuries, on United States commerce.[7] The Court will reserve ruling on the jurisdictional, standing, and consolidation questions with respect to the domestic plaintiffs' federal antitrust claims pending the filing of these more detailed allegations. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Class Action Complaint. An order will accompany this Opinion.

June 7th, 2001

/s/ _____
Thomas F. Hogan
United States District Judge

[7] If either domestic plaintiff finds that it cannot allege the necessary facts to establish subject matter jurisdiction and standing in accordance with the Court's legal rulings in this Opinion, that plaintiff should file the appropriate dismissal documents with the Court.

No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN S.A., *et al.*,
Plaintiffs-Appellants,
v.
F. HOFFMAN-LAROCHE, LTD., *et al.*,
Defendants-Appellees.

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
for the District of Columbia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
QUESTION PRESENTED	1
STATEMENT	2
DISCUSSION	6
A. The Panel Decision Merits En Banc Review	6
B. The Panel Majority's Holding Is Inconsistent With The Statutory Text, History, And Purposes	8
CONCLUSION	15
ADDENDUM	

TABLE OF AUTHORITIES

CASES	Page
BHP New Zealand, Ltd. v. UCAR International, Inc., Nos. 01-3329, 01-3340 & 01-3991 (3d Cir. argued Mar. 11, 2003)	7
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	9
Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)	4, 6, 10
Empagran, S.A. v. F. Hoffman-La Roche, Ltd., No. Civ. 001686TFH, 2001 WL 761360 (D.D.C. June 7, 2001)	3, 4
Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993)	14
Kruman v. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002)	4, 7, 9
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	11
Metallgesellschaft AG v. Sumitomo Corp. of America, No. 00-3700 (7th Cir. argued Sept. 5, 2001)	7
In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702 (D. Md. 2001)	10
National Credit Union Admin. v. First National Bank & Trust Co., 522 U.S. 429 (1998)	10
Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978)	10-11, 12
Reiter v. Sonotone, 442 U.S. 330 (1979)	13
In re Vitamins Antitrust Litigation, No. 99-197THF, 2000 WL 1737867 (D.D.C. Mar. 31, 2000)	2
Warth v. Seldin, 422 U.S. 490 (1975)	8

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES AND RULE	Page
Clayton Act, 15 U.S.C. 15 *et seq.*:	
§ 15	2
§ 15(a)	12
§ 26	2
Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a	*passim*
Sherman Act, 15 U.S.C. 1-1	2
Fed. R. App. P. 35(b)(1)(B)	7
MISCELLANEOUS	
Australian Competition & Consumer Commission, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers* (Mar. 1, 2001), http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=267	2
Brooke Barnes, *Sotheby's, Christie's to Settle Claims by Overseas Customers*, Wall Street Journal (Mar. 12, 2003)	4
Canadian Competition Bureau, *Fines in Order of Magnitude - Competition Act*, (Oct. 10, 2002), http://strategis.ic.gc.ca/SSG/ct01709e.html	2
H.R. Rep. No. 686 (1982), 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487	5, 9, 10, 14
Francisco Peiró, *Commission adopts eight new decisions imposing fines on hard-core cartels*, 1 Competition Policy Newsletter (European Comm'n) (Feb. 2002), http://europa.eu.int/comm/competition/publications/cpn/cpn2002_1.pdf	2
U.S. Dep't of Justice, *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993)	12-13

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On Appeal from the United States District Court
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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

STATEMENT OF INTEREST

This brief is submitted in response to the Court's Order of March 7, 2003, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, provides jurisdiction under the Sherman Act over the claims of a foreign plaintiff injured by a conspiracy having direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, when the foreign plaintiff's claimed injury does not arise from those domestic effects.

STATEMENT

1. In the mid-1990s, the United States began investigating global price-fixing and market allocation conspiracies among domestic and foreign manufacturers and distributors of bulk vitamins ("vitamin companies"), in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to those conspiracies, cartel members sold billions of dollars' worth of vitamins in the United States and around the world. To date, the United States has negotiated plea agreements with twelve corporate defendants and thirteen individual defendants, obtaining fines exceeding $900 million–including the largest criminal fine ($500 million) ever obtained by the Department of Justice under any statute. Moreover, eleven of the thirteen individuals have received sentences resulting in imprisonment, while one defendant awaits sentencing. European Union, Canadian, and Australian authorities similarly have obtained record fines against the vitamin companies.[1]

In the wake of the government's investigation, private parties brought multiple suits against the vitamin companies, seeking treble damages and attorneys' fees (15 U.S.C. 1, 15, 26) stemming from overcharges paid as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid hundreds of millions of dollars. *In re Vitamins Antitrust Litig.*, No. 99-197 THF, 2000 WL 1737867 (D.D.C. Mar. 31, 2000). This case

[1] Francisco Peiró, *Commission adopts eight new decisions imposing fines on hard-core cartels*, 1 Competition Policy Newsl. (European Comm'n), Feb. 2002, at 30-34 (over ∈855 million in fines), *available at* http://europa.eu.int/comm/competition/publications/cpn/cpn2002_1.pdf; Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers* (Mar. 1, 2001), *available at* http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=267; Canadian Competition Bureau, *Fines in Order of Magnitude—Competition Act*, *available at* http://strategis.ic.gc.ca/SSG/ct01709e.html.

arises from claims by "foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies . . . for delivery outside the United States." Pet. App. A6.

2. The district court (Hogan, J.) dismissed the foreign plaintiffs' claims for lack of subject matter jurisdiction, holding that those plaintiffs had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case" under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. *Empagran, S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360, at *3 (D.D.C. June 7, 2001).[2] The district court explained that, although the foreign plaintiffs had alleged that "the conduct causing their injuries

[2] The FTAIA, which in 1982 became Section 7 of the Sherman Act, provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> [*Proviso*] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a.

resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce,'" the plaintiffs had not alleged that "the effect providing the jurisdictional nexus . . . [was also] the basis for the injury alleged under the antitrust laws." *Id.* at *2 (citations omitted).[3]

3. A divided panel of this Court (Edwards, Henderson, and Rogers, JJ.) reversed and remanded. Pet. App. A1-A36. The court observed that "the Second and Fifth Circuits have split" on "the question whether the FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at A13. The court observed (*id.* at A13-A14) that the Fifth Circuit in *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), *cert. denied*, 534 U.S. 1127 (2002), held that the FTAIA bars claims in which the plaintiff's injury does not stem from the conspiracy's anticompetitive domestic effects. By contrast, the Second Circuit in *Kruman v. Christie's International PLC*, 284 F.3d 384, 400 (2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002), held that the FTAIA permits suit when the plaintiff's injury does not arise from the domestic effect of the conspiracy as long as a "domestic effect violate[s] the substantive provisions of the Sherman Act."[4]

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. A19. The majority rejected the plaintiffs' argument–based on *Kruman*, 284 F.3d at 397-400–that the

[3] Because the district court found subject matter jurisdiction lacking, it did not reach the defendants' alternative argument that the foreign plaintiffs lacked antitrust standing. *Empagran S.A.*, 2001 WL 761360, at *5.

[4] The parties in the *Kruman* case have reportedly agreed to settle their case. Brooke Barnes, *Sotheby's, Christie's to Settle Claims by Overseas Customers*, Wall St. J., Mar. 12, 2003, at B2.

"FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20. The majority nonetheless interpreted the phrase "gives rise to a claim" in Section 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* at A19.

The majority also relied on the legislative history of the FTAIA and policy considerations to support its expansive interpretation of the Act. Acknowledging that portions of the sole relevant congressional committee report, H.R. Rep. No. 686 (1982), 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report), support the Fifth Circuit's interpretation of the FTAIA, the majority believed it "most noteworthy . . . that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue." Pet. App. A23. The majority found "most compelling," however, the prospect that an expansive interpretation of the FTAIA to allow persons like appellants to sue would maximize deterrence of international cartels by "forc[ing] the conspirator to internalize the full costs of his anticompetitive conduct." *Id.* at A20.

The majority further held that the appellants have antitrust standing. Pet. App. A31-A34. The court reasoned that "the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at A33.

Judge Henderson dissented. Pet. App. A37-A39. She disagreed with the majority's interpretation of the FTAIA,

explaining that, "[n]otably, the word 'claim' in the [Act] refers to the specific claim asserted by the injured party." *Id.* at A37 n.2.

DISCUSSION

A. The Panel Decision Merits En Banc Review

1. The Fifth Circuit in *Statoil* held that "the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." 241 F.3d at 428. After a certiorari petition was filed in *Statoil*, the Supreme Court invited the Solicitor General to express the views of the United States. In response, the Solicitor General filed an amicus brief on behalf of the United States and Federal Trade Commission taking the position that the Fifth Circuit's decision in *Statoil* correctly interpreted the FTAIA to require that the anticompetitive effects on United States commerce give rise to a plaintiff's claimed injuries. Brief For The United States And The Federal Trade Commission As Amici Curiae, at 10-17, *Statoil ASA v. HeereMac v.o.f.*, No. 00-1842 (*Statoil* Br.)[5] The government's brief also explained that the Fifth Circuit's reading of the Act would not impair effective deterrence of antitrust violations or federal criminal enforcement of the antitrust laws against international cartels. *Id.* at 8-10. The government concluded, moreover, that the Fifth Circuit's decision did not warrant the Supreme Court's attention at that time because the decision was "the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce." *Id.* at 5.

[5] For the Court's convenience, we attach as an addendum a copy of the government's amicus brief in *Statoil*. [Addendum omitted.]

Since the filing of the government's *Statoil* brief, two courts of appeals have reached interpretations of the FTAIA that conflict with the Fifth Circuit's decision in *Statoil*. As the panel observed (Pet. App. A4, A13-A14), the Second Circuit in *Kruman* rejected the view that the FTAIA "require[s] that the 'effect' on domestic commerce be the basis for the alleged injury suffered by a plaintiff," and instead held that the FTAIA's "language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act." 284 F.3d at 399. Moreover, the majority's decision in the present case holds that the FTAIA permits a plaintiff to sue based on foreign injury arising from foreign conduct. That decision sharply contrasts with the Fifth Circuit's decision in *Statoil*, but also differs from the Second Circuit's decision in *Kruman*. See Pet. App. A19 ("Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.").

2. The government urges that this Court grant rehearing en banc because the majority's decision deepens a circuit split on an issue of exceptional and recurring importance regarding the scope of the antitrust laws. Fed. R. App. P. 35(b)(1)(B). With increasing frequency, foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. *Statoil* Br. 7. Indeed, appeals involving the issue whether such suits are permissible under the FTAIA are under submission in the Third and Seventh Circuits. *BHP New Zealand Ltd. v. UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340 & 01-3991 (3d Cir. argued Mar. 11, 2003); *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, No. 00-3700 (7th Cir. argued Sept. 5, 2001). The issue also has been addressed in many district court decisions. Reh'g Pet. 8 n.4 (collecting cases); *Statoil* Br. 7. The United

States expects that similar suits will follow in light of the majority's holding in this case that the FTAIA does not bar such suits.

B. The Panel Majority's Holding Is Inconsistent With The Statutory Text, History, And Purposes

The government continues to adhere to the position set forth in its amicus brief in *Statoil* that the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct.

1. It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad. *Statoil* Br. 11. The panel has embraced the remarkable proposition, however, that the FTAIA allows a suit even when a plaintiff is injured overseas *and* the injury stems entirely from a conspiracy's effects overseas. The panel reached that result by a "literal" reading of the word "a" in Section 6a(2) to mean that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. *Statoil* Br. 12; cf. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties").

This interpretation is supported by principles of antitrust injury and standing embedded in the FTAIA. Section 6a(2) of

the FTAIA requires that domestic effects of the conduct in question "give[] rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). In *Kruman*, the Second Circuit held that because the FTAIA amended the Sherman Act—not the Clayton Act—the FTAIA "only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20 (citing *Kruman*, 284 F.3d at 397-400). The panel majority correctly rejected that approach because "Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of 'conduct,' 'effect,' and 'claim' the key to FTAIA." *Id.* at A20; see also *Statoil* Br. 12-13.

The majority erred, however, in concluding that the statute requires merely that "*some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act," Pet. App. A22 (emphasis added), because Congress incorporated antitrust injury and standing concepts in the FTAIA. See House Report at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing."). To have a "claim," a plaintiff must show "antitrust injury"—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487.

The FTAIA's focus is on domestic effects of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. Thus, established principles of antitrust injury and standing inform a proper interpretation of the FTAIA's language and require that the

plaintiff–not just someone–have a "claim" under the Sherman Act. Cf. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing zone-of-interest requirement for prudential standing).

2. The majority acknowledges that portions of the FTAIA's legislative history support the Fifth Circuit's interpretation of the Act, Pet. App. A23, A28, but concludes that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *id.* at A23. The majority thus assumes that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation–a dubious analytical approach to a statute that was prompted in significant part by a perceived need to clarify the limitations of the Sherman Act's reach over international transactions. House Report at 2. The salient point is that nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce. The majority's interpretation of what the legislative history "implicitly assumes," Pet. App. A25, is simply unavailing because there is no indication that Congress had in mind the scenario occurring here–foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), provides the relevant context for all of the House Report passages cited by the majority. See House Report at 10 (citing *Pfizer*). *Pfizer* did not address the jurisdictional reach of the antitrust laws. Rather, it held that a foreign government that purchased

goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." 434 U.S. at 320. As discussed above, there is no dispute that the FTAIA permits suits by foreign purchasers who are injured by *domestic* anticompetitive effects of illegal conduct. Those plaintiffs, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from overseas conduct. Pet. App. A9.

3. a. We further disagree with the majority's reliance (Pet. App. A30) on what it considered a "most compelling" rationale: that its expansive interpretation of the FTAIA is necessary to deter international cartels from harming United States commerce. The majority reasons that allowing foreign plaintiffs to sue for treble damages in U.S. district court for foreign injuries suffered by defendants' foreign conduct "forces the conspirator to internalize the full costs of his anticompetitive conduct." *Ibid.* The paramount purpose of the United States' antitrust laws, however, is to protect consumers, competition, and commerce in the United States. *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *ibid.*, the Court's decision in *Pfizer*, as we have pointed out, involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. The Court did not intimate that the purposes of the antitrust laws would support the availability of a private treble damages action when foreign injury is sustained exclusively as a result of *foreign* conduct.

The Supreme Court has made clear that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 582 (1986). The Department of Justice follows that admonition in prosecuting international cartels by focusing on domestic commerce when calculating fines under the Sentencing Guidelines. See *Statoil* Br. 8-10. Similarly, for private plaintiffs, that admonition is appropriately followed by providing a cause of action only for such plaintiffs–domestic and foreign–who suffer injury from a conspiracy's effect on domestic commerce.[6]

Moreover, policy considerations based on deterrence counsel *against* the panel's expansive interpretation of the FTAIA that permits suits for injuries sustained abroad that arise from foreign conduct. Price-fixing conspiracies are inherently difficult to detect and prosecute. Cooperation by a co-conspirator, through provision of documents or testimony, thus is often vital to law enforcement. To induce such cooperation, the Antitrust Division of the Department of Justice maintains a robust *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993), that offers strong incentives to co-conspirators who elect voluntarily to disclose their criminal conduct and cooperate with prosecutors. That policy has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels–including the vitamins cartel that is the subject of this case–that continue to injure American consumers.

Under the policy, the first cooperating corporation (and its officers) may receive amnesty from *criminal* prosecution. 4 Trade Reg. Rep. (CCH) ¶ 13,113 at 20,649-21, 20,649-22. They remain subject, however, to private actions seeking treble damages under 15 U.S.C. 15(a). Thus, potential

[6] The majority's decision also ignores the striking change in the legal landscape since *Pfizer*. Not only has Congress enhanced the penalties available against cartels, but there has been a marked growth in foreign antitrust statutes and enforcement, particularly in the !ast decade. *Statoil* Br. 15-16; Reh'g Pet. 4-5.

amnesty applicants weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty policy. Without question, "private suits provide a significant supplement . . . to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter Corp. v. Sonotone*, 442 U.S. 330, 344 (1979). The rule adopted by the majority, however, would effect a sea change in the number and type of private actions permitted under the Sherman Act. We are aware of no other country whose antitrust laws provide for treble damages. By permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority's decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement. The panel's decision thus threatens to impair the ability of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce *in the United States*. Such a decrease in effective enforcement of the antitrust laws, therefore, has the potential to weaken deterrence–the opposite of what the panel intended. Pet. App. A28-A31.

b. There are additional countervailing policy reasons to require that a plaintiff's injury arise from a conspiracy's anticompetitive domestic effects. The rule embraced by the majority threatens to burden the federal courts in the United States with suits seeking to recover for injuries sustained abroad and arising exclusively from foreign conduct and foreign anticompetitive effects. Under the panel's decision, the critical inquiry is whether a conspiracy's effect on domestic commerce "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. The majority does not explain how that determination is to be made when the party who suffered the

relevant injury is not "before the court." *Ibid.* It is clear, however, that once *any* plaintiff is determined to have a claim arising from an injury sustained by the domestic anti-competitive effects of a conspiracy, the rule embraced by the panel would permit any foreign purchaser to bring suit for treble damages in the district courts of the United States, even when the purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." *Id.* at A5.

We are unaware of any decision pre-dating the FTAIA that permitted such suits. Congress passed the FTAIA to "exempt from the Sherman Act export transactions that did not injure the United States economy," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993), and to create a "single, objective test–the 'direct, substantial, and reasonably foreseeable effect' test" to "serve as a simple and straightforward clarification of *existing* American law," House Report, *supra*, at 2 (emphasis added). Congress did not intend the sweeping change brought about by the rule adopted by the majority, which would open the district courts of the United States to suits to recover for injuries suffered abroad solely as a result of a conspiracy's effect on foreign commerce.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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* The Solicitor General is recused in this case.

[ADDENDUM]

[The brief for the government filed by the Solicitor General in *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), which was attached as an addendum to the Solicitor General's brief, can be found at http//www.usdoj.gov/osg/briefs/2001/2pet/6invit/2000-842.pet.ami.inv.pdf.]

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No. 03-___

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IN THE

Supreme Court of the United States

F. Hoffman-LaRoche, Ltd., et al.,
Petitioners,

v.

Empagran, S.A., et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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QUESTION PRESENTED

Does the Foreign Trade Antitrust Improvements Act preclude this suit, in which respondents were injured as a result of the effect of petitioners' unlawful conduct on U.S. commerce?

RULE 29.6 STATEMENT

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

The parent company of respondent Brisbane is Brisbane Export Holdings Pty. Ltd. No publicly held company has a 10% or greater ownership interest in Brisbane.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

TABLE OF CONTENTS

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
I. This Case Presents An Inappropriate Vehicle To Decide The Question Presented. 1
II. Any Conflict Should Be Allowed To Percolate In The Lower Courts. 9
III. The Decision Below Is Correct On The Merits. 18
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Access Telecomm., Inc. v. *MCI Telecomms. Corp.*, 197 F.3d 694 (CA5 1999).....12
Assoc. Gen. Contractors, Inc. v. *Cal. State Council of Carpenters*, 459 U.S. 519 (1983).....18
BHP New Zealand Ltd. v. *UCAR Int'l Inc.*, Nos. 01-3329, 01-3340 & 01-3991.....14
Brunswick Corp. v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).....22
Carpet Group Int'l v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (CA3 2000).....3, 29
Dee-K Enters. v. *Heveafil Sdn. Bhd.*, 299 F.3d 281 (CA4 2002).....13, 22
Den Norske Stats Oljeselskap AS v. *Heeremac v.o.f.*, 241 F.3d 420 (CA5 2001), *cert. denied*, 534 U.S. 1127 (2002).....passim
Hartford Fire Ins. Co. v. *California*, 509 U.S. 764 (1993) passim
In re Insurance Antitrust Litig., 938 F.2d 919 (CA9 1991), *aff'd in part, rev'd in part*, 509 U.S. 764 (1993).....13
Industrial Dev. Corp. v. *Mitsui & Co.*, 594 F.2d 48 (CA5 1979).....12
Kruman v. *Christie's Int'l PLC*, 284 F.3d 384 (CA2 2002), *cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003).....passim
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).....12, 16
Metallgesellschaft AG v. *Sumitomo Corp. of Am.*, 325 F.3d 836 (CA7 2003).....9, 27
MM Global Servs. v. *Dow Chem. Co.* (D. Conn. No. 3:02cv1107).....14
Mortensen v. *First Fed. Savings & Loan Ass'n*, 549 F.2d 884 (CA3 1977).....3
National Bank of Canada v. *Interbank Card Assoc.*, 666 F.2d 6 (1981).....22

Nike v. *Kasky*, 123 S. Ct. 2554 (2003).....14
No. 03-281, *Consumers Union* v. *Suzuki Motor Corp.*, *cert. denied*, 2003 U.S. LEXIS 8027 (Nov. 3, 2003).....6
Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978).....27
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991).....20
Turicentro, S.A. v. *American Airlines, Inc.*, 303 F.3d 293 (CA3 2002).....15, 17, 22
United Phosphorus, Ltd. v. *Angus Chem. Corp.*, 322 F.3d 942 (CA7 2003) (en banc).....14, 25
United States v. *Aluminum Co. of Am.*, 148 F.2d 416 (CA2 1945).....16
United States v. *Nippon Paper Indus. Co.*, 109 F.3d 1 (CA1 1997).....16
United States v. *Sisal Sales Corp.*, 274 U.S. 268 (1927).....2, 12
VMI v. *United States*, 508 U.S. 946 (1993).....6

Statutes

15 U.S.C. 6a(1).....7, 29, 30
28 U.S.C. 1367.....8
Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6a passim

Other Authorities

Br. for U.S., *Den Norske* 16 n.7.....16
Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. Cin. L. Rev. 779 (1986).....26
H.R. 5235, 97th Cong. (1982).....23
Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust L.J. 711 (2001).....25
Invitation Br. for U.S., No. 02-815, *City of Sacramento* v. *Barden*, *cert. denied*, 123 U.S. 2639 (2003).....6
John H. Shenefeld, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 Fordham L. Rev. 350 (1983).....20

No. 01-7115, Oral Arg. Trans. 6 ..... 4, 26
Phillip A. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application (2d. ed. 2000) 9, 12, 13, 28
Richard W. Becker & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 Tex. Int'l L.J. 11 (2003) 8
Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, Antitrust 53 (Summer 2001) 27
Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 Dick. L. Rev. 763 (2003) 25

Rules

Fed. R. App. P. 35 advisory committee's note 10

INTRODUCTION

Petitioners seek review of the D.C. Circuit's holding that a provision of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. 6a(2) (hereinafter, "Clause 2"), does not extinguish the district court's jurisdiction under the Sherman Act over conduct that affects U.S. commerce in those instances in which the particular plaintiff is injured in foreign commerce. Certiorari should be denied for three reasons.

First, to the extent the narrow conflict described by petitioners even exists, this is an inappropriate case to resolve it. Most significantly, the answer to the question presented makes no difference to the outcome of this case, in which respondents allege that they were injured by the anticompetitive effects *on U.S. commerce* of petitioners' conspiracy. In addition, the case is interlocutory, and the record details numerous important questions of federal law that remain to be resolved in the proceedings now underway in the district court. Indeed, the proceedings on remand will substantially illuminate the very jurisdictional question presented by the petition.

Second, this Court should allow the question presented to percolate in the lower courts. The courts of appeals have issued only three decisions on this issue, all very recently, and all of which are consistent with each other in light of the particular allegations presented by the respective cases. It thus remains unclear whether a genuine conflict exists. There is furthermore a substantial prospect that the Fifth Circuit, which is the only outlier court of appeals and which has seen each succeeding circuit adopt a different reading, will reverse itself en banc in a later case. For this Court to intervene at this early stage would also interrupt the lower courts' nascent exploration of a variety of related issues not presented by this particular case, including the role of comity considerations and the standards articulated by the Restatement of the Foreign Relations Laws.

Third, the decision below is correct on the merits. The D.C. Circuit's reading is most consistent with the text of Clause 2, which requires that the domestic effect of the defendants' conduct (here, the effect of petitioners' unlawful conspiracy on

U.S. markets) "give[] rise to a claim" under the Sherman Act. Petitioners do not seriously dispute that their conduct did have such an effect, and there is no warrant for their attempt to rewrite the statute as if it extinguished the rights of all foreign and domestic plaintiffs injured in overseas transactions. Petitioners' principal argument seems to be that the D.C. Circuit's reading marks a substantial departure from pre-FTAIA law, and thus represents an extraterritorial expansion of U.S. antitrust jurisdiction. But that contention fundamentally misstates the law as it stood in 1982, given that it has long been "well established" that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). See also, *e.g.*, *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927). Petitioners also rely very heavily on developments since Congress enacted the FTAIA, such as the expansion of both foreign antitrust regimes and the federal government's amnesty program, none of which illuminate Congress's intent in 1982, and all of which are properly raised before the legislature rather than this Court.

Certiorari accordingly should be denied.

I. This Case Presents An Inappropriate Vehicle To Decide The Question Presented.

Certiorari should be denied because, for two reasons, this case is an inappropriate vehicle to decide the question presented. *First*, the district court would have had jurisdiction on either reading of Clause 2 because respondents properly alleged that their injury arose from the effects of petitioners' conspiracy on U.S. commerce. *Second*, the petition is interlocutory and many important federal issues remain to be resolved on remand.

1. Certiorari is unwarranted because the answer to the question presented makes no difference to this case. Respondents prevail under either approach, because petitioners' unelaborated statement that "[r]espondents do not contend that they were injured in U.S. commerce" (Pet. 5) is simply inaccurate. Respondents allege that petitioners' cartel sought to

control the price of bulk vitamins in every region of the world by using the United States as the "benchmark" for pricing. Because vitamins are fungible and the market is integrated and interconnected – such that deviations from the cartel price in this country would have permitted respondents to avoid the cartel price in other markets – the cartel went to great lengths to keep both price and supply in worldwide equilibrium. In particular, petitioners manipulated both price and supply in other markets in order to adjust for shifts in the United States. See generally C.A. J.A. 15-18, 38-57, 59, 72-75, 77; C.A. Sealed S.A. 7-10, 12-13, 38-44, 47-49, 61-62.[1]

As set forth in respondents' complaint, "Defendants' anticompetitive activities and their effects have caused injury to the Plaintiff Classes both *inside the United States* and in foreign nations." Respts' Am. Compl. ¶ 110 (jurisdictional allegation for "Count I: Violation of Sherman and Clayton Acts") (emphasis added).[2] As respondents argued in the district court,

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[1] The material in the Court of Appeals Sealed Supplemental Appendix is subject to a protective order and cannot be discussed in this Opposition. Suffice it to say that it contains direct and irrefutable evidence that petitioners explicitly recognized the prospect of arbitrage if prices in the United States differed from those in Europe and Asia. The evidence furthermore reflects both that petitioners recognized that the worldwide vitamins market is highly integrated, and that petitioners consistently allocated market share and set prices. Although there is accordingly direct evidence in the record, petitioners could not in any event contend that respondents have adduced an insufficient factual foundation for this jurisdictional basis for their claims. Because "in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim, at the motion to dismiss stage, 'it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at the trial stage.'" *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (CA3 2000) (quoting *Mortensen* v. *First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (CA3 1977)).

[2] See also Respts' Am. Compl. ¶ 3(a) (alleging that the purpose of the conspiracy was "to fix and maintain prices and to

"What we see is the prices in the United States were integrally interconnected with the prices outside of the United States. Pricing inside reflected pricing outside. * * * There was a unitary world market where virtually all purchasers, regardless of their site, were considered fungible, and an injury in one market caused an injury in every other segment of that market." C.A. J.A. 72. "If you affected the prices in the United States, you affected the prices around the world, regardless of where you were, and that's why even the [Fifth Circuit] majority in *Statoil* [*Den Norske*] says the antitrust laws of the United States are designed to prevent and to permit relief." *Id.* 74.[3] Respondents fully briefed the issue below.[4] It was also a principal focus of the oral argument in the court of appeals.[5]

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coordinate price increases for the sale of various vitamins throughout the United States and foreign countries"); *id.* ¶ 75 ("The Class Vitamins of Defendants are sold in interstate commerce in the United States."); *id.* ¶ 76 ("The Class Vitamins are considered to be commodities * * *."); *id.* ¶ 80(b)(1), (2) (stating that the conspiracy included an agreement to "fix, increase, and maintain prices and to coordinate price increases for the sale of such vitamins in the United States and elsewhere" and "allocate among corporate conspirators the volume of sales and market shares of such vitamins in the United States and elsewhere"); *id.* ¶ 94(j) (stating that the conspiracy included an agreement under "which the North American [petitioners] agreed to leave the European vitamin markets and the European [petitioners] agreed to leave the North American vitamin markets").

[3] See also *id.* 72 ("Arbitrage would wipe out literally most of the anticompetitive acts that they sought to impose in any one region, because the product could then be shifted to another part of the world.").

[4] See Respts' C.A. Br. 10-15 ("Appellants Meet the Jurisdictional Standard of the FTAIA As Set Out by the District Court" (heading)); Respts' C.A. Reply Br. 2-4 ("The District Court's Decision Was Premature As Plaintiffs Have Demonstrated A Set Of Facts That Would Entitle Them To Relief" (heading)).

[5] See, *e.g.*, No. 01-7115, Oral Arg. Tr. 6 (The Court: "And as I understand your argument, regardless of whether we go with the

The D.C. Circuit accordingly recognized that the complaint alleges that petitioners' "unlawful price-fixing conduct had adverse effects *in the United States* and in other nations that caused injury to [respondents] in connection with their foreign purchases of vitamin products." Pet. App. 1a (emphasis added). The court of appeals thus detailed respondents' argument that their complaint states a viable cause of action even under the restrictive view of the FTAIA that petitioners advance in this Court:

> [Respondents] contend that [petitioners] caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, [respondents] say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to [respondents], the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, [respondents] claim that *[they] were injured as a direct result of the increases in United States prices* even though they bought vitamins abroad.

Pet. App. 3a (emphases omitted and added).

Fifth Circuit or the Second Circuit, you should still prevail."); *id.* 7 (The Court: "You say defendant's anticompetitive activities and their effects have caused injury to the plaintiff classes, both in the United States and in foreign nations."); *id.* 18 (The Court: "One of the things you argue is that the District Court never decided your claim that the – that your action does arise from the U.S. effects, although I think it would be more properly, the U.S. injury of the global conspiracy."); *id.* 25 (The Court: "Right, but the argument would be that if indeed the U.S. price was the benchmark and you have all these domestic plaintiffs who are claiming that they were injured by this conduct as well, then the adverse effect is necessarily connected with the United States.").

The question presented thus makes no difference to the outcome of this case. In particular, there is every reason to believe that the Fifth Circuit would not deem this suit precluded by the FTAIA. That court in *Den Norske Stats Oljeselskap AS* v. *Heeremac v.o.f.*, 241 F.3d 420, 427 n.22 (2001), *cert. denied*, 534 U.S. 1127 (2002), articulated "the proper inquiry" under its ruling to be, "regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce?" Here, it did. Certainly, no court of appeals has held that a claim like respondents' is precluded by the FTAIA. Although the D.C. Circuit found it unnecessary to reach this "alternative" jurisdictional basis, it is fully preserved and would be pressed by respondents as their first ground for affirmance if this Court were to grant review.

2. This is also an inappropriate vehicle to decide the question presented because the court of appeals "remand[ed] the case for further proceedings." Pet. App. 39a. The petition is thus interlocutory, a factor that is itself generally sufficient to deny certiorari. See *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); see also, *e.g.*, Invitation Br. for U.S., No. 02-815, *City of Sacramento* v. *Barden* 15-18, *cert. denied*, 123 U.S. 2639 (2003). This is a classic instance in which that rule applies, as this case presents no extraordinary ground justifying interlocutory intervention.

To the contrary, this case is especially likely to generate other federal issues that could merit review in this Court. As petitioners explained below, but ignore in this Court, in their view, the petition presents only the "*threshold* issue of whether the litigation may proceed at all." Petrs' C.A. Stay Mot. 1 (emphasis added). Such piecemeal invocation of this Court's resources is seriously disfavored. The Court generally denies interlocutory review even when the underlying claims rest on *state law* and thus are unlikely to give rise to further federal questions. See, *e.g.*, No. 03-281, *Consumers Union* v. *Suzuki Motor Corp.*, *cert. denied*, 2003 U.S. LEXIS 8027 (Nov. 3, 2003).

The record thus reflects an array of important federal law issues that are raised by the ongoing proceedings in the district court and that could merit eventual review in this Court or could otherwise resolve the case. According to petitioners,

> Further proceedings in the District Court will immediately raise critical issues of class certification, personal jurisdiction and venue. For example, a consideration of whether the claims of purchasers in different countries all around the world are sufficiently common to allow for class certification will certainly be a hotly disputed issue. Regardless of whether any previous discovery relevant to United States purchasers proves useful in prosecuting an action brought on behalf of exclusively foreign purchasers, a significant amount of novel discovery will be required if the case proceeds, including, for example, expert analysis of the economic conditions in each of the separate countries in which the foreign purchases were allegedly made.

Petrs' C.A. Stay Mot. 10. Other federal law questions that will be addressed on remand are easily located in petitioners' filings. For example,

- Petitioners apparently intend to allege that respondents' complaint fails under Clause 1 of the FTAIA because petitioners' conduct did not have a sufficient effect on U.S. commerce. Below, petitioners did not contest this issue "*for purposes of this appeal*." Pet. App. 9a (citing Oral Arg. Tr. 30-31) (emphasis added). The requirement of a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce presents a potentially "significant limit on the reach of the antitrust laws" that remains unexplored in the cases to date. *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 402 (CA2 2002), *cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003). Indeed, courts' efforts to decide "exactly what constitutes a 'direct, substantial, and reasonably foreseeable effect' have created uncertainty" that could later merit review in this Court. Richard W. Becker & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and*

Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?, 38 TEX. INT'L L.J. 11, 15 (2003).

- Petitioners have challenged the Sherman Act's constitutionality as valid Commerce Clause legislation, an argument the D.C. Circuit found "unnecessary for us to address" in light of the appeal's procedural posture. Pet. App. 9a. Certainly, petitioners' drive-by constitutional challenge to the Sherman Act, which they reiterate in this Court (see Pet. 15) but which has never been squarely resolved by *any* circuit, merits further consideration in the lower courts.
- The court of appeals directed the district court to exercise its discretion regarding the "supplemental jurisdiction over [respondents'] foreign law claims pursuant to 28 U.S.C. § 1367." Pet. App. 39a.
- Further, "[a]s to virtually all of the foreign defendants, personal jurisdiction was never litigated in the U.S. purchasers litigation, because most foreign Defendants stipulated to personal jurisdiction in the District of Columbia for purposes of actions *other than Empagran*." Petrs' C.A. Reply in Supp't of Stay 9 (emphasis in original).

Even more important, there will be discovery and a trial on the merits of respondents' federal antitrust claims. Those claims manifestly present complicated and important issues of federal law that could merit review in this Court. Of particular note, proceedings on the merits also will greatly illuminate the very issue that lies at the heart of petitioners' argument before this Court: that respondents' claims have an insufficient nexus to U.S. commerce. In this context above almost all others, the merits of plaintiffs' antitrust claims are inextricable from the determination whether the court should exercise jurisdiction. "Both inquiries rest on judgments about the apparent will of Congress with respect to foreign transactions. * * * Further, many appraisals of asserting jurisdiction include an appraisal of the anticompetitive harm caused by the challenged restraint—and the latter is largely a substantive inquiry." IA Phillip A.

Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 273a (2d ed. 2000). But not only has the trial in this case yet to be held, the Court would not have the benefit of the record in another, similar case, for no trial has *ever* been held on *any* complaint on which Clause 2 is determinative of jurisdiction.[6]

II. Any Conflict Should Be Allowed To Percolate In The Lower Courts.

1. This Court can safely allow the thin circuit conflict over the proper construction of Clause 2 alleged by the petition to percolate in the lower courts. To the extent that a conflict exists, it is merely two to one.[7] But in any event, the results in this case

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[6] The Areeda treatise thus suggests that the jurisdictional question presented by this case should be resolved in light of a more complete factual record:

> A 12(b)(1) challenge to the court's jurisdiction under the FTAIA can in fact proceed along two different routes. First, the defendant might simply argue that the complaint fails to *allege* sufficient facts upon which FTAIA jurisdiction can be established. * * * * Second, however, the defendant might offer a "factual" challenge, in which by affidavit or other means it alleges facts calling the court's jurisdiction into question. Such a challenge to subject matter jurisdiction necessarily goes beyond the face of the complaint. Because the issue goes to the power of the court to decide, at this point it is necessary for the court to make a factual inquiry under the general standards that apply to judicial factual determinations in bench trials—i.e., the judge need not use a summary judgment standard that interprets the facts in a way that favors the nonmovant, but rather must find the facts on his or her own.

IA Areeda & Hovenkamp, *supra*, ¶ 273c4 (Supp.).

[7] The Seventh Circuit has indicated its agreement with the majority rule in dictum. *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, 325 F.3d 836, 840 (CA7 2003) (although declining to reach "a definitive resolution," concluding that Seventh Circuit precedent

and *Kruman* are consistent with those reached by the Fifth Circuit in *Den Norske*. This case and *Kruman* involve the fungible markets in bulk vitamins and auction services, respectively. Absent a worldwide conspiracy that elevated prices *in the United States*, the plaintiffs in both cases could have and would have made purchases in this country to avoid the higher prices set by the conspiracies overseas. In other words, the anticompetitive effect of the conspiracies in the United States directly contributed to the plaintiffs' injury. Such cases, in which the plaintiff "alleges a scheme in which there were explicit agreements to fix prices in both foreign and domestic markets," are "unique." *Kruman*, 284 F.3d at 402.

Den Norske is a very different case. It involved the defendants' alleged conspiracy to allocate geographically the market for heavy-lift barges. "Only six or seven heavy-lift barges exist *in the world*." *Den Norske*, 241 F.3d at 422 (emphasis added). The plaintiffs there merely alleged that the market allocation scheme permitted those defendants operating in the Gulf of Mexico "to maintain their monopolistic pricing." *Id.* at 425. As petitioners acknowledge, "the plaintiff's claim arose *exclusively* from its North Sea contracting and not from *any* impact of the conspiracy on U.S. commerce." Pet. 9 (emphases added).

Any conflict is furthermore likely to be corrected by the courts of appeals, just as the Federal Rules of Appellate Procedure contemplate. The Fifth Circuit stands alone among the courts of appeals in its reading of Section 6a. Petitioners acknowledge that *Den Norske* was "the first court of appeals decision to interpret the FTAIA." Pet. 9. Previously, "no circuit" had "interpreted the critical portion of the FTAIA at issue." *Den Norske*, 241 F.3d at 424 n.13. Two courts of appeals have since considered *Den Norske* and disagreed, as has another in dictum. This presents the classic circumstance in which rehearing en banc is favored and likely. The Advisory Notes to Federal Rule of Appellate Procedure 35 explain that en

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"appears to point in the direction of the approach taken by the D.C. and Second Circuits").

banc reconsideration is warranted when the court of appeals stands alone in its views. See Fed. R. App. P. 35, Adv. Comm. Notes to 1998 amendments.

The particular circumstances of *Den Norske* make application of that practice especially likely here. The Fifth Circuit's decision in *Den Norkse* is a two-to-one panel opinion with a strong dissent by Judge Higginbotham. *Critically*, no en banc poll was taken in that case because, "with three active judges recused, it would, as a practical matter, [have] be[en] nigh futile." CA5 No. 99-20763, Order of Mar. 12, 2001 (Higginbotham, J.). Other than in *Den Norske*, the Fifth Circuit "has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury." *Den Norske*, 241 F.3d at 424. There is accordingly a genuine prospect that the Fifth Circuit will revisit *Den Norske* and obviate the circuit conflict if that court is presented with the issue in another case.

The panel majority in *Den Norske* relied on readings of the Sherman Act and the Constitution that it is difficult to believe the full Fifth Circuit will embrace when given the opportunity to decide the question. The panel majority construed Clause 2 in light of its "doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act." 241 F.3d at 426. The panel majority furthermore deemed its reading "strengthened by the limits placed on Congressional power in the Constitution," which "gives Congress the authority only to regulate interstate commerce and 'commerce with *foreign* nations,'" such that "even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause." *Id.* at 426 n.18 (emphasis in *Den Norske*). And the panel emphasized the presumption against extraterritoriality. *Id.* at 427-28.

Even the United States, while supporting the Fifth Circuit's *result*, does not defend these central aspects of its reasoning. Further, the reasoning in *Den Norske* cannot be reconciled with this Court's precedents nor, importantly, with the jurisprudence of the Fifth Circuit itself. En banc reconsideration is thus likely.

"[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). As early as 1927, this Court "held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce." Pet. App. 10a (citing *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927)). Accordingly, no presumption against extraterritoriality applies. Contra Pet. 15. And even the *Hartford Fire* dissenters recognized that "this Court has repeatedly upheld [Congress's] power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected." 509 U.S. at 813-14. "The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States." IA Areeda & Hovenkamp, *supra*, ¶ 270.[8] See, *e.g.*, *Access Telecomm., Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 712 (CA5 1999) (Sherman Act recovery is allowed "for foreign conduct that produces 'some substantial effect in the United States'" (quoting *Hartford Fire*, 509 U.S. at 976)); *Industrial Dev. Corp.* v. *Mitsui & Co.*, 594 F.2d 48, 52 (CA5 1979) ("*American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States."), *cert. denied*, 445 U.S. 903 (1980).

2. Permitting the question presented to percolate would also have the substantial benefit of permitting the lower courts to explore the host of issues beyond the meaning of Clause 2 that

[8] For this reason, the D.C. Circuit's decision is completely consistent with the recognition that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

are related to jurisdiction but not presented by this case. The federal courts are presently grappling in international antitrust cases with several such issues. Petitioners' contention that the opinions issued by the courts of appeals to date "comprehensively set forth the competing considerations of law and policy" (Pet. 11-12) is thus mistaken. To the contrary, this case *fails* to present many of the "recurring question[s] of the extraterritorial reach of the U.S. antitrust laws." Contra *id.* 3. For this Court to decide the meaning of Clause 2 in an interlocutory posture and in a case in which those issues have been waived threatens to produce a distorted construction of the statute.

Petitioners thus treat Clause 2 as if it were the only unresolved issue with respect to limitations on the invocation of the Sherman Act in international cases. But the situation is not so simple. Commentators have proposed an array of standards that have never been explored by any lower court. The Restatement similarly suggests the application of standards relating to the "principal purpose" of the defendants' conduct and the reasonability of the suit. Restatement (Third) of the Foreign Relations Laws § 415 (1987). For its part, the Ninth Circuit holds that the FTAIA "qualified but did not undermine the basic comity doctrine it had previously elaborated." IA Areeda & Hovenkamp, *supra*, ¶ 273c3 (citing *In re Insurance Antitrust Litig.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part*, 509 U.S. 764 (1993)). However, petitioners, for whatever reason, waived all such arguments in this case in favor of their absolutist position.

Furthermore, the federal courts have given almost no attention to the FTAIA's introductory clause, which exempts from its application all "import commerce." Cf. *Dee-K Enters.* v. *Heveafil Sdn. Bhd.*, 299 F.3d 281, 287 (CA4 2002) ("[b]ecause this case involves importation of foreign-made goods, however – conduct Congress *expressly exempted* from FTAIA coverage * * * – the FTAIA standard obviously does not directly govern this case * * * ."). There is a substantial argument that international cartels, such as this one, that fix the prices of commodities that are imported into the United States

are not subject to the FTAIA at all. But that question is not presented here.

3. For all the foregoing reasons, the Court would benefit from permitting the questions presented and related issues to percolate further in the lower courts. Cf. *Nike* v. *Kasky*, 123 S. Ct. 2554 (2003) (Stevens, J., concurring in the order dismissing certiorari). That is the import of petitioners' own argument that the application of the federal antitrust laws in the international arena can in some cases raise sensitive questions. "The extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area." *United Phosphorus, Ltd.* v. *Angus Chem. Corp.*, 322 F.3d 942, 952 (CA7 2003) (en banc).

Of note, two international antitrust cases are now proceeding through discovery and trial: this case and another in which a motion to dismiss on FTAIA grounds was denied on September 12, 2003 (*MM Global Servs.* v. *Dow Chem. Co.* (D. Conn. No. 3:02cv1107)). Further proceedings in those cases, including the disposition of various federal defenses raised in the proceedings, would provide the Court with both a more developed record and a more complete understanding of the many interrelated issues raised by international antitrust litigation.

At the very least, the Court should await a decision and subsequent petition for certiorari from the Third Circuit's ruling in *BHP New Zealand Ltd.* v. *UCAR Int'l Inc.*, Nos. 01-3329, 01-3340 & 01-3991 (argued Mar. 11, 2003), in which the proper construction of Clause 2 is dispositive. See CA3 Nos. 01-3329, 01-3340, 01-3991 Oral Arg. Tr., *UCAR* 4 ("Our appeal presents one main issue of law which is whether the district court erroneously interpreted the Foreign Trade Antitrust Improvements Act of 1982."). As counsel for the defendants in *UCAR* (who is also co-counsel to petitioners in this case) advised the Third Circuit at argument, "the [Supreme] [C]ourt would benefit from your views." Oral Arg. Tr., *UCAR* 28.[9]

[9] In *UCAR*, unlike this case (see *supra*), the question of the effect of the defendants' conduct on U.S. commerce has been finally resolved in favor of the plaintiffs. See Oral Arg. Tr., *UCAR* 17.

Petitioners' contrary argument – that this Court's immediate intervention is required in order to staunch the "flood" of similar cases (Pet. 3) – is hyperbole. The identical allegation was made after the Second Circuit's March 2002 decision in *Kruman*. See, *e.g.*, Pet. for Cert., *Kruman* 10 (predicting "a flood" of litigation). So far as respondents are aware, in the time since the Second Circuit decided the *Kruman* case, only a single additional international antitrust action that would implicate the question presented has been filed anywhere in the country. Indeed, at the very most, a *dozen* cases have *ever* been brought in the U.S. courts raising the issue.

Petitioners' characterization of the question presented as "frequently recurring" (Pet. 3) is thus similarly inaccurate. Congress enacted the FTAIA in 1982. Yet the issue has thus far been decided in only three appellate cases, all quite recently. None has produced a single follow-up decision. "Although passed two decades ago, few federal courts have had occasion to apply the [FTAIA]." *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 299 (CA3 2002). That fact confirms that this Court would benefit substantially from permitting the question presented to percolate further. Cf. *Den Norske*, 241 F.3d at 429 ("Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect 'gives rise' to the plaintiff's antitrust claim, very little case law exists to aid our inquiry.").

Moreover, whatever the importance *of the question presented*, the supposed *conflict* in the courts of appeals itself lacks practical significance. Some circuit splits affect primary conduct because they render activity lawful in certain jurisdictions but unlawful elsewhere. This case, by contrast, is just a fight about money – the size of damages awards. For petitioners do not dispute that they can be sued over the *identical conduct* by foreign and domestic plaintiffs who are harmed as a result of effects on U.S. commerce. Further, petitioners contend that their conduct is subject to rigorous enforcement by other

jurisdictions. Cf. Br. for U.S., *Den Norske* 16 n.7 (lauding the "global response to the international 'bulk vitamins cartel'" as "illustrat[ing] energetic enforcement efforts against cartels operating worldwide").[10]

Any conflict furthermore falls at the margins of federal antitrust law. It has been settled for nearly sixty years that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) (citing *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416 (CA2 1945) (L. Hand, J.)). See also *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-83 n.6 (1986); *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (CA1 1997). As the United States explained below,

> It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad.

U.S. C.A. Br. 8.

Finally, as an institutional matter, this Court's intervention into this controversy is unnecessary at this time, because Congress is better equipped to resolve any uncertainty regarding

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[10] Nor does the status quo present the prospect of forum shopping. Not only has little international antitrust litigation followed in the wake of the D.C. and Second Circuits' decisions (see *supra*), but petitioners are unable to identify any case in which the plaintiffs avoided the Fifth Circuit as a logical forum. Both MDL procedures (in complex litigation) and doctrines such as forum non conveniens (in other cases) ensure that litigants do not take advantage of particular circuits' rules in this context. Further, even before the courts of appeals uniformly rejected the holding of *Den Norske*, plaintiffs were free to pursue their claims in the great many circuits that had not decided the question.

the FTAIA's meaning. Although this Court appropriately resolves conflicts in statutory interpretation that the legislature leaves unresolved for an intolerable period of time, this is not such a case; the purported conflict is brand new. Congress should reasonably be expected to address both the perceived conflict and the emergence of foreign antitrust legislation on its own initiative. But this Court's intervention could render that prospect less likely, not more.

4. Petitioners rightly do not claim a conflict on the question whether plaintiffs have "standing" to assert an antitrust claim in these circumstances, but they do contend that the decision below "is inconsistent" with *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293 (CA3 2002). Pet. 11. Petitioners characterize *Turicentro* as holding "that plaintiffs whose injuries occurred exclusively in foreign markets lack standing." *Id.*

Petitioners' reading of *Turicentro* is too strained. At the very least, that decision is too ambiguous to give rise to a genuine circuit conflict, particularly given that the court's discussion of standing was unnecessary to its decision and thus dictum.[11] The Third Circuit in *Turicento* ultimately found it unnecessary to decide the meaning of Clause 2 because the alleged conspiracy in that case affected *only* foreign commerce, such that "the complaint contained no allegations amounting to *any* 'effect' on United States commerce." 303 F.3d at 304 (emphasis added). On that basis, the court held that the plaintiffs' complaint was properly dismissed because jurisdiction was lacking under any reading of Clause 2. *Id.* Petitioners do not claim a conflict with this central holding of *Turicentro*.

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[11] Indeed, petitioners implausibly read this dictum in *Turicentro* to render the Third Circuit's analysis of Clause 2, which was the central issue in the case, irrelevant. Petitioners contend that the court of appeals ruled that all persons injured outside the United States lack antitrust standing. See Pet. 11. On that view, the Third Circuit had no cause at all to consider the issue that principally occupied its opinion: whether Clause 2 of the FTAIA confers jurisdiction on such plaintiffs.

Petitioners instead rely on the fact that the Third Circuit went on to discuss standing in three paragraphs. Recognizing that the question of standing "implicates many of the same issues as the jurisdictional analysis," the court held that the "plaintiffs lack antitrust standing" "*for the reasons noted*" in its jurisdictional analysis. 303 F.3d at 307 (emphasis added). The court adhered to its understanding of this Court's holding that "the standing inquiry in antitrust cases is dependent on the finding of subject matter jurisdiction." *Id.* (citing *Assoc. Gen. Contractors, Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535-45 (1983)). The Third Circuit thus held that standing was lacking because the plaintiffs were not harmed by a conspiracy that affected the United States, and thus the injuries they suffered were "not of the type Congress intended to prevent." *Id.* That holding presents no conflict with the D.C. Circuit's decision in this case, in which respondents allege (and will prove on remand) that petitioners' conspiracy did affect U.S. commerce.

Petitioners nonetheless rely on the fact that the Third Circuit noted in one sentence that "[p]laintiffs' injuries occurred exclusively in foreign markets." Pet. 11 (quoting 303 F.3d at 307). But that statement merely reflects one of the facts of the case; it did not purport to set forth all the facts relevant to the court's standing analysis. Nor can petitioners' reading be reconciled with the Third Circuit's actual conclusion that standing was lacking "for the reasons noted," *i.e.*, that the case presented no injury to U.S. commerce whatsoever. *Id.*

III. The Decision Below Is Correct On The Merits.

The D.C. Circuit correctly recognized that its was the superior interpretation of Clause 2 not only in light of the "literal reading of the statute, but also in light of the statute's legislative history and underlying policies." Pet. App. 20a. Petitioners thus misrepresent the decision below, implausibly claiming that the D.C. Circuit eschewed "the text of the FTAIA" in favor of "selected statements in the House Report on the FTAIA," and "most important * * * for the court * * * its determination that, as a matter of policy, 'suits by foreign purchasers harmed solely

by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies.'" Pet. 6-7. In reality, the court of appeals concluded, based on a careful study of the text, structure, and legislative history, that petitioners' position would require engrafting onto the FTAIA restrictions that Congress did not enact and that furthermore conflict with the policies Congress was avowedly pursuing.

1. Petitioners rely on the fact that that "the jurisdictional limitation of section 2" "expressly requir[es] that a claim must 'arise from' a U.S. effect." Pet. 21. But this supposed "arise from" requirement does *not* appear anywhere in the FTAIA; it is an invention of petitioners. In reality, Clause 2 provides that the defendant's conduct must "give rise[] to a claim" under the Sherman Act. Petitioners would rewrite that clear language to require that the defendant's anticompetitive acts give rise to "the plaintiff's claim." That is the less plausible reading. "[A]dopting the defendants' interpretation would mean rewriting the statute to replace the word 'a' in subsection 2 with the words 'the plaintiff's', resulting in a new subsection 2 that requires that the 'effect give[] rise to *the plaintiff's* claim.' * * * Here, the language is clear. Congress used the indefinite article ('a') rather than the definite article ('the'). As a court, we must be faithful to, and honor, legislative meaning." *Kruman*, 284 F.3d at 400.

The fact that there are limited circumstances in which a departure from the plain meaning of the indefinite article "a" is appropriate does not assist petitioners (contra Pet. 14), because neither the text nor the structure of the statute provides substantial support for their reading. Petitioners' contention that Clause 2 is "most natural[ly]" read to refer to the plaintiff's claim (Pet. 13) is thus unexplained and in any event incorrect. The FTAIA delimits the "conduct" to which the Sherman Act applies. "Sections 1 to 7 of this title *shall not apply to conduct* involving trade or commerce (other than import trade or import commerce) with foreign nations *unless* * * *." 15 U.S.C. 6a (emphases added). Clause 2 specifically directs that the effect of the defendant's conduct on U.S. commerce must "give[] rise to a claim" under the Sherman Act.

On petitioners' view, in a single case, the identical anticompetitive "conduct" – *e.g.*, a price-fixing conspiracy like petitioners' – is simultaneously subject to the Sherman Act (if the plaintiff was injured in the United States) and immune under the Act (if the plaintiff was injured elsewhere). That reading cannot be reconciled with the statute's structure, which speaks of "conduct" in a unitary sense. Respondents' reading better reflects the design of FTAIA, as it renders "conduct" subject to the Sherman Act without regard to the identity of a particular plaintiff.

Petitioners' only possible response is that the "conduct" in question under the Sherman Act is the particular transaction in which the plaintiff was injured. But *that* argument conflicts with basic antitrust principles and accordingly has been rejected by *every* circuit. As the court of appeals explained:

> Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Both the Second *and Fifth* Circuits have adopted appellants' approach, and appellants' approach is correct.

Pet. App. 9a (citations omitted) (emphasis added). As in *Kruman*, "[t]he illegal act in this case was not the imposition of high prices but the formation of the agreement to fix prices. * * * The 'essence' of the section 1 violation alleged by the plaintiffs 'is the illegal agreement itself – rather than the overt acts performed in furtherance of it.'" *Kruman*, 284 F.3d at 398-99 (quoting *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991)).[12]

[12] The fact that the Sherman Act "den[ies] jurisdiction" over "*conduct* affecting wholly foreign commerce" (Pet. 17 (quoting John H. Shenefeld, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 Fordham L. Rev. 350, 364 (1983) (emphasis added)) thus is of no moment, for petitioners' "conduct" had enormous, anticompetitive effects in this country.

Petitioners' reading would also render the proviso to the FTAIA surplusage. The statute provides, "If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B) [concerning export trade], then sections 1 to 7 of this title shall apply to such conduct only for injury to export business *in the United States*." 15 U.S.C. 6a (proviso) (emphasis added). Inexplicably, the petition affirmatively invokes the proviso as supposedly illustrating that the Sherman Act applies "only in the case of 'a person engaged' in such trade '*in the United States*' and '*only* for injury to export business *in the United States*.'" Pet. 13 (emphases in Pet.). On petitioners' view, however, the provision is meaningless because *all* conduct (not the limited subset covered by the proviso) is actionable only to the extent it causes injury "in the United States." The proviso furthermore demonstrates that Congress was perfectly capable of crafting in plain terms the limitation that petitioners would read into the statute.

For all of the foregoing reasons, respondents' reading is the one embraced by the Restatement of the Foreign Relations Laws. In the FTAIA,

> Congress apparently believed that activity whose anti-competitive effects are felt *only* in foreign states should not be a concern of United States antitrust regulation, but that activities carried out abroad that have "direct, substantial, and reasonably foreseeable" effect in the United States or on the import trade of the United States (as by limiting imports or fixing the price of imported products) should be subject to the Sherman and FTC Acts.

Restatement (Third) of the Foreign Relations Laws § 415 cmt. b (1987).

2. In light of the statute's text and structure, petitioners' heavy reliance on legislative history (see Pet. 14, 17-18, 21, 23) is unavailing. But in any event, the history supports respondents. To the extent Clause 2 is particularly concerned with non-export commerce, Congress in that provision resolved the disagreement over the effect on U.S. commerce necessary to give rise to a Sherman Act claim. Whereas most courts had deemed anticompetitive conduct to be actionable so long as it

had a foreseeable "effect" on U.S. commerce, "[c]onsiderations of international comity * * * occasionally entered the analysis of later courts." *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 298 (CA3 2002). See also *Dee-K Enters., Inc.* v. *Heveafil Sdn. Bhd.*, 299 F.3d 281, 288 (CA4 2002) ("In the decades after *Alcoa*," courts "disagreed as to whether antitrust jurisdiction over foreign conduct requires both 'an effect' on United States commerce and an 'intent to affect United States commerce,' or just effect or just intent, and as to the magnitude of any effect."). The year before Congress enacted the FTAIA, the Second Circuit, which had first endorsed the "effects" test, modified its rule to specify that the Sherman Act applied only if the effect on U.S. commerce was anticompetitive. See *National Bank of Canada* v. *Interbank Card Assoc.*, 666 F.2d 6, 8 (1981). That is precisely the rule Congress adopted soon thereafter in the FTAIA when it provided that the effect on U.S. commerce must "give[] rise to a claim." Of particular note, the definitive report on the statute "specifically and approvingly references *National Bank of Canada*." *Kruman*, 284 F.3d at 401 (quoting H.R. Rep. 97-686, at 11 (citing *National Bank of Canada* for the proposition that "the domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit")). The House Report thus explains:

> [A] plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

In effect, Clause 2 imports the requirement of "antitrust standing" that a plaintiff may recover only for "injur[ies] of the type the antitrust laws were intended to prevent" – namely, injuries that "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

Petitioners' repeated reliance on the House Report is thus unavailing. The D.C. Circuit carefully reviewed this report, correctly concluding that on balance it supported respondents. The court of appeals' careful study could not be further afield from reliance on "selected statements" and "fragments" from the legislative history. Contra Pet. 6, 18. The court of appeals recognized that the excerpts repeatedly invoked by petitioners (to the effect that persons injured in U.S. commerce have a right to bring suit) do not undermine the remaining discussion in the Report that equally demonstrates that Congress was not concerned with the locale of the plaintiff's injury:

> Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce.

Pet. App. 24a. The legislative history cited by petitioners thus "does not (when read in context) denigrate or exclude the less restrictive view." *Id.*[13]

Petitioners' claim that, before the Second Circuit's decision in *Kruman*, "no court had ever held that the federal antitrust laws authorize claims seeking to remedy harms resulting solely from the effects of anticompetitive conduct on *non-U.S.* commerce" (Pet. 4) is misleading. The established rule in this

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[13] Petitioners' reading is also inconsistent with the history of the provision that became Clause 2. The original version of the FTAIA provided that the effect on U.S. commerce must be "the basis of the violation alleged under this Act [*i.e.*, the Sherman Act]." H.R. 5235, 97th Cong. § 2 (1982). The House specifically replaced that language with the text Congress later enacted to *avoid* the incorrect suggestion (which petitioners now press) "that an effect, rather than conduct, is the basis for a violation." House FTAIA Report 18. Petitioners would read this aspect of the legislative history precisely backwards. See Pet. 14.

country since at least the 1940s has been that a suit may be maintained under the Sherman Act *so long as* the defendants' conduct affected U.S. commerce. See *supra*. No decision imposed petitioners' proposed limitation that defendants are immune from paying damages to persons injured in foreign markets. Petitioners thus err (Pet. 3, 4) in characterizing the decision below as "holding that the [FTAIA] provides foreign plaintiffs with a U.S. antitrust remedy" and "that the FTAIA in effect *expanded* the extraterritorial reach of the Sherman Act." The remedy is provided by the plain terms of the Sherman and Clayton Acts. And Congress, by enacting the FTAIA in 1982, did not adopt any restriction on that remedy applicable to this case.[14]

3. Petitioners also contend that policy considerations support their reading of Clause 2. "But general policy considerations cannot justify reading the FTAIA in a way contrary to its unambiguous text." *Kruman*, 284 F.3d at 402. Further, petitioners are simply not correct in asserting that the D.C. Circuit's decision will undermine this nation's relationships with its trading partners. There is no evidence that the pendency of this action has inhibited the investigation of petitioners' conspiracy by foreign competition authorities, which have levied considerable penalties. See, *e.g.*, Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of*

[14] Petitioners also misdescribe the import of their own position when they characterize the D.C. Circuit's decision as "provid[ing] foreign plaintiffs with a U.S. antitrust injury" and "[p]ermitting foreign plaintiffs to reject the means chosen by their own nations to protect competition," and when they further argue that "Congress did not intend to have the federal antitrust laws regulate transactions between foreign buyers and foreign sellers." Pet 1, 23. The question presented has absolutely nothing to do with the plaintiffs' and defendants' citizenship. Petitioners' position would both extinguish suits by U.S. residents and also immunize U.S. defendants from liability for injuries arising from overseas transactions.

International Competition Law, 68 Antitrust L.J. 711, 714-18 (2001).[15]

To the extent there is any foreign distaste for U.S. antitrust policy, that has been the norm for decades without any ill effects on U.S. trade relationships and without provoking a further response from Congress after the FTAIA. "The *Alcoa* decision [by Judge Learned Hand] was not warmly received in other countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer." *United Phosphorus, Ltd.* v. *Angus Chem. Corp.*, 322 F.3d 942, 960 (CA7 2003) (en banc) (Wood, J. dissenting).[16] Similarly, "[a] decade ago, after [this Court's decision in] *Hartford Fire Insurance Co.* v. *California*, commentators by and large echoed a single criticism: 'The death of interest-balancing meant that courts were left with no choice but to apply the Sherman Act to foreign conduct in a manner that would create foreign relations trouble for the United States.'" Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 Dick. L. Rev. 763, 763 (2003) (citations omitted). Certainly, nothing about the recent pendency of international antitrust actions has undermined U.S. trade relations. "Interestingly, the number of disputes over so-called extraterritorial applications of national laws, whether by the United States, the European Union, or others, has dropped dramatically." *United Phosphorus*, 322 F.3d at 961 n.1 (Wood, J., dissenting).

[15] The facts of this case also establish that petitioners' foreign policy arguments are seriously overbroad. "Respondents are five foreign companies located in Australia, Ecuador, Panama, and Ukraine." Pet. 5. Petitioners fail to identify relevant competition laws in those nations or to explain how this action imperils relations with them.

[16] Thus, if anything, the expansion of aggressive antitrust regimes in other countries *reduces* the conflict created by the previous reluctance of our trading partners to regulate anticompetitive conduct.

Further, petitioners' claim that in recent years foreign governments have greatly expanded their own antitrust regimes (see Pet. 23) amounts to no more than a request for a judicial amendment to the FTAIA, which Congress enacted in 1982. As petitioners acknowledged below, their position is thus ultimately that "there has been tremendous change in international antitrust enforcement in the [past] 25 years." C.A.D.C. No. 01-7115, Oral Arg. Tr. 28. And petitioners make the same point in arguing that Congress has greatly expanded the maximum criminal penalties under the Sherman Act since 1982 (see Pet. 19) and that, still more recently, the Executive Branch has expanded its use of amnesty programs (*id.* 20). If petitioners and the Executive Branch believe that the time has come for a change in U.S. antitrust policy, they certainly can make that argument to Congress.

But in any event, "the FTAIA was not passed for the purpose of accommodating our trading partners. Any advantage the FTAIA provides them is largely incidental." Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 780 (1986). Congress's concern in the federal antitrust laws, including in the FTAIA, was instead to protect U.S. markets from anticompetitive conduct *wherever manifested* without inhibiting conduct by domestic corporations that has no adverse effect in this country. Although petitioners contend that "[c]artel conspiracy cases are massive[and] sprawling" (Pet. 24), the more accurate and relevant point is that the *cartels themselves* are "massive and sprawling," leading Congress to conclude that they pose substantial threats to U.S. commerce. Only respondents' reading is consistent with that purpose, as the D.C., Second, and Seventh Circuits have all recognized:

> [I]f foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be underdeterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy.

Pet. App. 32a-33a.[17]

[17] See also *Kruman*, 284 F.3d at 393 ("There is a distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets. The antitrust laws apply to the latter sort of conduct and not the former. Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets."); *Metallgesellschaft AG*, 325 F.3d at 842 ("A global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad."); Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53, 53 (2001) (petitioners' view would "change[] the calculus of risk for rational cartel participants in a way that significantly decreases the law's deterrent effect on international cartels").

That conclusion is also supported by this Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), which the House Report cites favorably. Contra Pet. 19. The relevant discussion in *Pfizer*, directly applicable here, is this Court's recognition that the failure to enforce the U.S. antitrust laws in circumstances involving foreign commerce could lead to arbitrage, as monopolists and price-fixers cover their losses in this country with gains elsewhere. See 434 U.S. at 315. Certainly, nothing about the question presented makes "clarification" of *Pfizer* "necessary." Contra Pet. 19 n.4. The judgment about the scope of the federal antitrust laws is one that Congress has already made.

It is in this respect that petitioners' reliance (Pet. 16) on the Areeda treatise is fundamentally misplaced. To be sure, "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers." IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 272h (2d ed. 2000), *quoted at* Pet. 16.[18] But the far more relevant point is that the antitrust laws protect Americans through rigorous pursuit of international cartels. "Clause number (2) simply reminds us that the [statute] does not itself define any substantive offense; once the effects specified there are shown to exist, a plaintiff will then be allowed to prove, if it can, that the defendant's conduct violates the legal standards of Sherman Act §§ 1-2." IA Areeda & Hovenkamp, *supra*, ¶ 272h2.

Petitioners' contrary theory that the D.C. Circuit's decision will overdeter antitrust violations – by creating such substantial civil penalties that conspirators will not cooperate with the Department of Justice's expanded amnesty program – is unpersuasive or, at most, a recent development properly raised before Congress as a ground for amending the FTAIA. The D.C. Circuit properly recognized that the fundamental premise of the Sherman Act, including its treble-damages provisions and expansive jurisdictional scope, is that the potential for substantial penalties deters conspiracies from arising *in the first place*. Indeed, that premise is confirmed by the power of the Department of Justice itself to determine fines based on the worldwide effects of the defendants' conspiracy.[19]

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[18] It is equally true, of course, that the concern of the U.S. antitrust laws is not protecting *defendants such as petitioners*, who concededly engaged in a massive conspiracy that caused serious harm to the U.S. economy and to U.S. consumers, resulting in record fines.

[19] To the extent that "[t]he FTAIA was enacted in 1982 to address concerns that unduly expansive projection of federal antitrust law would hinder U.S. global competitiveness" (Pet. 4), that purpose is reflected in a provision not at issue here – *viz.*, the statute's proviso, which states that effects on export commerce are

4. For the same reasons that respondents' construction of the FTAIA is correct, they have "antitrust standing" – *i.e.*, the injury suffered by respondents is of the sort the antitrust laws were designed to prevent. "[T]he arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intend to prevent the harm that the foreign plaintiffs suffered here." Pet. App. 36a. Even the Fifth Circuit agrees that the standing determination follows *a fortiori* from the conclusion that jurisdiction exists or is instead lacking under the FTAIA. *Den Norske*, 241 F.3d at 431 n.32.[20]

Petitioners' contrary standing analysis is insupportable. They jump from the proposition that (under Clause 1) "'a direct, substantial, and reasonably foreseeable effect' on U.S. commerce is necessary for *foreign conduct* to be unlawful" directly to the unrelated conclusion that "as a matter of antitrust standing, only injuries that 'flow from' those U.S. effects are actionable." Pet. 21 (emphasis added). The simple answer is that this is not a case about "foreign conduct" as that term is used in the antitrust laws. Petitioners conceded below for

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actionable "only for injury to export business in the United States." Thus, "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods *by exempting export transactions* that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 71 (CA3 2000) (emphasis added). As petitioners elsewhere acknowledge (albeit with misplaced emphasis), this Court has explained that "[t]he FTAIA was intended to exempt from the Sherman Act *export transactions* that did not injure the United States economy." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993) (emphasis added) (emphasis from Pet. 16 omitted).

[20] Contrary to petitioners' suggestion (Pet. 20), the federal government did not contend below that respondents lack antitrust standing.

purposes of this appeal that their conduct *did* affect U.S. commerce. See *supra*.[21]

CONCLUSION

The petition for certiorari should be denied.[22]

Respectfully submitted,

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[21] In any event, petitioners did not even make this standing argument in the court of appeals, illustrating that these questions remain poorly developed. Petitioners' court of appeals brief did not even mention Clause 1 in its discussion of standing. See Petrs' C.A. Br. 41-45.

[22] Petitioners also appropriately do not suggest that there would be any benefit in this case to soliciting the views of the United States, which have already been expressed in its invitation brief in *Den Norske*. As the Petition explains, the invited *amicus* brief of the United States in the court of appeals agrees with petitioners on the merits of the first question presented (which was also its position in its invitation brief in this case in *Den Norske*) and recognizes a circuit conflict. The arguments set forth in this Opposition regarding whether this is the appropriate time and the appropriate case to decide any conflict would not be advanced (and the progress of the case could be considerably impeded) by issuing another invitation for the government to submit its views yet again.

(3)

No. 03-724

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IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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21 pp

RULE 29.6 STATEMENT

Corporate disclosure information for each of the petitioners can be found in the Petition for a Writ of Certiorari at page ii.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
I. THIS IS AN APPROPRIATE CASE TO RESOLVE THE QUESTION PRESENTED	1
II. THE CLEAR CONFLICT AMONG THE COURTS OF APPEALS IS RIPE FOR REVIEW	4
III. THE COURT OF APPEALS ERRED FOR THE REASONS STATED BY THE SOLICITOR GENERAL BELOW	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) 2, 3

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 3

Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340) 4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 3, 8-9

In re Rhône-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 3-4

Turicentro, S.A. v. American Airlines, Inc., 303 F.3d 293 (3d Cir. 2002) 6-7

Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682, *petition for cert. granted*, 71 U.S.L.W. 3576 (U.S. Mar. 10, 2003) 3

STATUTE

15 U.S.C. § 6a ..... *passim*

LEGISLATIVE HISTORY

H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 8

MISCELLANEOUS

Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW (2d ed. 2000) 9

TABLE OF AUTHORITIES—Continued

Page

Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement*, Speech Before the ABA Section of Antitrust Law (Nov. 18, 2003) (available at http://www.usdoj.gov/atr/public/speeches/201509.htm.) 6, 8

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REPLY TO BRIEF IN OPPOSITION

Several circuit courts have expressly recognized the direct conflict among the courts of appeals over the question presented in this case. Pet. 8-9. Respondents offer no valid reason why this case is not an appropriate vehicle, and why this Court should not act now, to resolve that conflict. Nor have respondents answered petitioners' showing that, prior to the enactment of the FTAIA, the Sherman Act was not applied to remedy the effects of anticompetitive conduct on foreign commerce, and that the FTAIA—a 1982 amendment to the Sherman Act—was passed to *limit*, not expand, the Sherman Act's extraterritorial reach. The text of the FTAIA, as the Solicitor General explained below, "contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." Pet. App. 75a.

I. THIS IS AN APPROPRIATE CASE TO RESOLVE THE QUESTION PRESENTED.

1. This case squarely presents the question whether injuries that arise from the effects of anticompetitive conduct on purely foreign commercial transactions are actionable under the U.S. antitrust laws.

Respondents' claim that their alleged injuries arose in U.S. commerce (Opp. 2-6), and thus would be actionable even if this Court were to reverse the D.C. Circuit, is untenable. Respondents do not dispute that they are foreign companies that purchased vitamins in foreign countries from other foreign companies for delivery outside the United States. Their quotations from the complaint, prior arguments and the opinion below (*id.*) offer no basis for placing their vitamin purchases within U.S. commerce. The petition accurately states that respondents have never contended that they were injured *in* U.S. commerce. Pet. 5.

Respondents' citation of the allegation in their complaint that petitioners' conduct "caused injury to the Plaintiff Classes both *inside the United States* and in foreign nations" (Opp. 3) is highly misleading. This lawsuit *formerly* included two purported plaintiff classes of purchasers of vitamins for delivery outside the United States: a class of foreign entities and a class of U.S.-based entities. Pet. App. 6a. Similarly, the purported representative plaintiffs formerly included two U.S.-based entities, one of which (alone among the plaintiffs) alleged that it had "suffered injury in the United States." *Id.* at 53a. The two U.S.-based plaintiffs both *withdrew* from this lawsuit before entry of final judgment by the district court, leaving only respondents, who are "foreign purchasers, who bought vitamins exclusively outside the United States" (*id.* at 8a). The complaint contains no allegation that *respondents* were injured "inside" the United States.

Respondents' contention that the vitamin cartel fixed prices on a "worldwide" basis using U.S. prices as the "benchmark" (Opp. 3-5) does not change the fact that their alleged injuries directly resulted from the cartel's effects on the purely *foreign* commercial transactions in which they engaged—*i.e.*, the alleged fixing of vitamin prices in foreign markets. Respondents' injuries "arise from" those foreign effects, not other effects on the United States. If respondents' sweeping theory of antitrust jurisdiction were correct, federal district courts would become world courts in cases of this kind, required to determine whether purchasers in foreign nations paid anticompetitive overcharges to foreign sellers. There is no basis for concluding that Congress ever intended that result under the Sherman Act or the FTAIA.

The Fifth Circuit in *HeereMac* squarely rejected respondents' argument. There, too, the plaintiff had alleged a "worldwide" conspiracy to control a "single, unified, global market" for heavy barge services. *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 425 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*,

534 U.S. 1127 (2002). The Fifth Circuit nevertheless refuted the assertion that the plaintiff's injuries from paying fixed prices for barge services in the North Sea "arose from" the effect of the conspiracy on the United States: "[W]hile we recognize that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea [by the plaintiff], the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim." *Id.* at 427. See also *id.* n.24.

2. The case is in a procedural posture appropriate for review, contrary to respondents' contention (Opp. 6-9). The court of appeals reviewed a dispositive ruling against respondents after entry of final judgment. Pet. App. 8a. If this Court reverses, that final judgment will be reinstated. This Court commonly reviews cases in precisely this procedural posture, including at least one other antitrust case to be decided this term. *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, *petition for cert. granted*, 71 U.S.L.W. (U.S. Mar. 10, 2003) (granting review of decision reversing order of dismissal). Several leading antitrust decisions, relied on by both sides in these proceedings, resulted from review of cases in the same procedural posture as this one. See, *e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (review of appellate decision reinstating claims dismissed by the district court); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (review of decision reversing summary judgment).

This case need not await further proceedings on the merits below. The pure question of law at issue—whether this case can proceed at all—is a discrete threshold question that is ready now for review by this Court. Respondents' goal, of course, is to avoid any review of the court of appeals' decision in the hope that petitioners will settle their claims rather than risk massive treble damages liability for foreign

claims worldwide. See generally *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, C.J.) (noting pressures on defendants to settle claims threatening massive potential damages). Indeed, in *Kruman*, the petitioners settled while their petition for review was pending before this Court. *Christie's Int'l PLC, et al., v. Kruman, et al.*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340). The FTAIA is a *jurisdictional* limitation, and its purposes would be defeated by allowing massive cases such as this one to lumber forward toward trial.

II. THE CLEAR CONFLICT AMONG THE COURTS OF APPEALS IS RIPE FOR REVIEW.

Respondents' attempts to minimize the conflict among the courts of appeals and the significance of the question presented—which the Solicitor General described as one of "exceptional and recurring importance"—are unavailing.

1. There is a clear division in the courts of appeals over the extraterritorial scope of the Sherman Act. Respondents stand alone in asserting that the decisions of the D.C. Circuit in this case and the Second Circuit in *Kruman* do not conflict with the decision of the Fifth Circuit in *HeereMac*. Opp. 9-10. The D.C. Circuit, other courts of appeals and the Solicitor General have all recognized the direct conflict created by these decisions. Pet. 8-11. Respondents' position that they are "consistent" has no merit; it rests on their invalid argument, refuted above (*supra*, p. 2-3), that their injuries (and also the injuries of the plaintiffs in *Kruman*) "arise from" a U.S. effect of the alleged conspiracy (Opp. 10). As noted above, the Fifth Circuit rejected precisely the same argument in *HeereMac*. See, *supra*, p. 3.

Respondents' speculation that the Fifth Circuit may reverse itself to conform to the views of the D.C. and Second Circuits (Opp. 11) is unfounded. The Fifth Circuit is unlikely to revisit its construction of the FTAIA, which has been endorsed by the United States and the Federal Trade Commission. Pet. 12

n.3. It is also entirely consistent with prior case law. Respondents' argument that the Fifth Circuit's decision is contrary to precedent does not identify any prior decision of any court holding that injuries arising from the effects of anticompetitive conduct on purely foreign commercial transactions are actionable under the federal antitrust laws. See Opp. 12. Indeed, respondents conceded in argument before the district court that no court had ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case. Pet. App. 52a.

There is no merit to respondents' suggestion that this Court should delay resolving the conflict over the FTAIA to allow the lower courts to "explore" other unidentified issues "related to jurisdiction." Opp. 12-13. The FTAIA imposes a *legislative* limitation on the extraterritorial application of U.S. antitrust law, and courts have appropriately turned to that statute in resolving disputed questions on that subject. That effort has now led to an inter-circuit conflict that only this Court can resolve.

2. Respondents contend that this Court should await another case to resolve the conflict among the courts of appeals, citing two cases pending in the lower courts. Opp. 14. There is no basis for assuming that either of these cases will be presented to this Court. Nor have respondents offered any reason to believe that either would be a better vehicle to review the question that is squarely presented in this case or would add anything new to the analyses of the statute already conducted by the Second, Fifth and D.C. Circuits.

Respondents' denial that foreign plaintiffs will flood the U.S. courts with claims that properly belong in foreign courts (Opp. 15) ignores the fact that thousands of foreign litigants could assert claims identical to respondents' in this action alone. See Lily Henning, *Antitrust Goes Global*, LEGAL TIMES, Oct. 13, 2003, at 1, 22 (reporting that one U.S. lawyer has "been contacted by hosts of foreign plaintiffs, but has

advised them to wait until the appeals in *Empagran* have run their course before filing suit"). Respondents' argument that the question presented here rarely arises (Opp. 15) conflicts with the Solicitor General's statement that the issue here has "recurring importance" due to the "increasing frequency" with which "foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items" (Pet. App. 73a). The Solicitor General has noted, moreover, the potential of the decision below to bring about "a sea change in the number and types of private actions permitted under the Sherman Act." *Id.* at 79a. A Deputy Assistant Attorney General in the Antitrust Division recently warned that it will encourage "international antitrust tourism" that would be "irresistible to many foreign plaintiffs whose alleged injuries have little to do with cognizable U.S. interests." Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement*, Speech Before the ABA Section of Antitrust Law (Nov. 18, 2003) ("*Perspectives*"), at 17 (available at http://www.usdoj.gov/atr/public/speeches/201509.htm.).

It is no response to say that Congress, rather than this Court, should resolve the conflict among the courts of appeals. Opp. 17. No bill is pending that would address this issue. Moreover, the construction of federal statutes is unquestionably the province of the courts, and the resolution of conflicts among the circuit courts is unquestionably the province of this Court. Respondents cite no authority for the proposition that this Court should not resolve disputes over the interpretation of federal legislation unless Congress has failed to act "for an intolerable period of time." Opp. 17.

3. The Third Circuit's decision in *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), provides further reason to review this case. That court determined that plaintiffs lacked standing because their injuries "occurred exclusively in foreign markets." *Id.* at 307. Respondents argue that this statement "merely reflects one of

the facts of the case." Opp. 18. But it was *the* fact that led the court to conclude that the plaintiffs' injuries were "not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." 303 F.3d at 307. The same fact is present here. The Third Circuit's decision is thus inconsistent with the D.C. Circuit's holding that respondents have standing to assert their federal antitrust claims.

III. THE COURT OF APPEALS ERRED FOR THE REASONS STATED BY THE SOLICITOR GENERAL BELOW.

The Solicitor General has explained that "the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct." Pet. App. 74a. The contrary interpretation of the statute by the court of appeals is profoundly wrong.

1. As the Solicitor General has observed, "the most natural reading of [the FTAIA] is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." Pet. App. 74a. The statement in the petition (at 21) that "a claim must 'arise from' a U.S. effect" is hardly an "invention" (Opp. 19). It accurately describes the statute's requirements that there be a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and that "such effect gives rise to a claim." 15 U.S.C. § 6a.

Respondents argue that, under the Solicitor General's interpretation, the same "unitary" conduct would be subject to U.S. antitrust regulation in certain cases but not in others, depending on where a given plaintiff's injury arose. Opp. 20. That result is entirely consistent with the statutory text. "The FTAIA's focus," as the Solicitor General explained below, "is on domestic effects of anticompetitive conduct" (Pet. App. 75a). The statute makes clear that the federal antitrust laws remedy only those injuries that arise from the effects of anticompetitive conduct on U.S. commerce. Respondents'

additional argument that this interpretation renders the FTAIA's proviso redundant (Opp. 21) was rejected even by the D.C. Circuit (Pet. App. 18a).[1]

2. The legislative history relied upon by the D.C. Circuit and respondents (Opp. 21-23) fails to justify their interpretation of the FTAIA. The Solicitor General has explained that "nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce" and that "there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods." Pet. App. 76a. Tellingly, respondents do not even address the statement in the legislative history that "the effect providing the jurisdictional nexus"—*i.e.*, the U.S. effect—"must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No. 97-686, at 10-12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

3. Respondents do not seriously defend the D.C. Circuit's policy judgment that "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." (Pet. App. 32a). As previously demonstrated, this judgment is inconsistent with the antitrust laws' historically limited focus on the U.S. effects of anticompetitive conduct (see Pet. 4, 15-16; Pet. App. 77a). The D.C. Circuit's policy judgment also clashes with the longstanding principle that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v.*

[1] As a Deputy Assistant Attorney General recently stated, "the [*Heere-Mac*] court accurately captured the meaning of the FTAIA as a matter of sound statutory construction, [and] the *Kruman* and *Empagran* courts did not." Delrahim, *Perspectives*, at 6-7.

Zenith Radio Corp., 475 U.S. 574, 582 (1986).[2] Moreover, as the Solicitor General has explained, the panel's decision threatens to undermine deterrence by discouraging participation in amnesty programs that are essential to enforcement of the federal antitrust laws. Pet. App. 79a (warning that the decision below "has the potential to weaken deterrence—the opposite of what the panel intended").

4. As the Solicitor General explained below, the D.C. Circuit's interpretation of the FTAIA is inconsistent with "principles of antitrust injury and standing embedded in the FTAIA," which "inform a proper interpretation of the FTAIA's language and require that the plaintiff—and not just someone—have a 'claim' under the Sherman Act." Pet. App. 74a, 75a-76a. Respondents' only answer is the question-begging assertion that "this is not a case about 'foreign conduct' as that term is used in the antitrust laws." Opp. 29. As explained in the petition (Pet. 21), only injuries that "flow from" the effect on *U.S. commerce* that makes a defendant's acts unlawful are actionable under governing rules of standing, and the FTAIA in no way altered those fundamental requirements.[3]

[2] Respondents garble the Areeda treatise (Opp. 28) by failing to include the final sentence of the paragraph they quote: "Thus, although the exporter can sue with respect to the injured export business, *a foreign consumer whose only injury is felt entirely in his foreign country cannot.*" 1A Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW (2d ed. 2000) ¶ 272h2, at 360 (emphasis added).

[3] Respondents wrongly claim that this argument was not made below. See Petrs' C.A. Br. at 40 (arguing that "liability * * * is limited to those injuries that flow from the feature of the restraint that makes it a violation, which is its quality of having caused [] an anticompetitive effect on U.S. commerce"). Moreover, the court below squarely decided the question of respondents' standing. Pet. App. 33a-37a.

CONCLUSION

The petition for a writ of certiorari should be granted.[4]

Respectfully submitted,

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[4] Respondents filed their opposition to certiorari one day after the filing of the petition in a transparent effort to prevent governmental and private amici from explaining the exceptional public importance of this case. Although the Solicitor General has already stated that the issue here is one of exceptional importance and that the decision by the D.C. Circuit is incorrect, the Court may nevertheless wish to seek the views of the United States as to whether the petition should be granted.

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No. 03-724

In the Supreme Court of the United States

F. HOFFMAN-LAROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN, S.A., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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78 AP

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has refused consent.

The Chamber is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity.

This case is an excellent vehicle for the Court to clear up the growing confusion among the lower courts regarding the right of foreign actors suffering injuries abroad to sue in U.S. courts and take advantage of U.S. antitrust laws. In the decision below, the D.C. Circuit interpreted the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, in a manner that rejects the views of the Executive Branch, conflicts directly with a prior decision by the Fifth Circuit, and fails to follow the rationale of recent decisions of the Third and Seventh Circuits. Together with the decision last year in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), cert. dismissed, 124 S. Ct. 27 (2003), the decision vastly expands the ability of plaintiffs to seek compensation in U.S. courts for injuries arising from the foreign effects of allegedly anticompetitive behavior.

The D.C. Circuit's expansion of the antitrust jurisdiction of U.S. courts threatens the Chamber's members with a dramatic increase of global forum shopping in the antitrust arena. Unusually permissive features of the American judicial system – including class actions, permissive discovery rules, and provisions for multiple and punitive damages – have proved immensely attractive to foreign plaintiffs with a basis to invoke U.S. court jurisdiction. Thus, even though foreign governments have developed their own mechanisms for redress of antitrust violations, the D.C. Circuit's construction of the FTAIA will invite foreign plaintiffs to sue here. Under this state of affairs, U.S. courts will become the global arbiters of civil liability for antitrust issues ranging from international price-fixing conspiracies to run-of-the-mill localized mergers – even when the claims at issue have little or no connection to the United States.

The likely flood of antitrust actions undoubtedly will inflate litigation costs and potential civil liability borne by the Chamber's members. But the D.C. Circuit's permissive new rule is entirely one-sided: members of *amicus* Chamber who are the *victims* of antitrust violations will gain no increased protections. If anything, affording permissive access to U.S. courts for foreign antitrust plaintiffs will dilute civil recoveries available to U.S. plaintiffs, even while inflating civil liability to U.S. defendants.

Members of *amicus* Chamber, a large and increasing number of which transact business in foreign countries, have a substantial interest in seeing the restoration of the limits placed on U.S. antitrust jurisdiction by the FTAIA. At a minimum, members of the Chamber need a coherent rule among the appellate courts in this country to order their legal expectations rationally.

The Chamber therefore should be granted leave to file the attached *amicus* brief.

Respectfully submitted.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. The Decision Below Would Produce Overwhelming Burdens on U.S. Businesses, Would Flood U.S. Courts With Claims by Foreign Plaintiffs, and Has No Countervailing Benefits	6
II. The Decision Below Undermines the Enforcement Authority of Other Countries' Antitrust Agencies and Risks Creating Political Conflict	13
III. The Worldwide Standing Rule that the D.C. Circuit Propounded Has No Basis in This Court's Law and Undermines Congress's Intent in Enacting the FTAIA	19
CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

Cases

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Commissioner of Competition v. *Air Canada*, 2003 Comp. Trib. 13 (Jul. 22, 2003) 18

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 10

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In re Copper Antitrust Litig., 117 F. Supp. 2d 875 (W.D. Wis. 2000) 19

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In re Rhône-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 10

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Page(s)

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Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 13

Midwest Machinery, Inc. v. *Northwest Airlines, Inc.*, 167 F.3d 439 (8th Cir. 1999) 18

Piper Aircraft Corp. v. *Reyno*, 454 U.S. 235 (1981) 6

Statutes

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Page(s)

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

This case is about global forum shopping. It is an attempt by foreign plaintiffs to take advantage of the liberality of the U.S. antitrust laws; the openness of U.S. courts; pro-plaintiff aspects of the Federal Rules of Civil Procedure; and the generosity of U.S. juries. The precise issue petitioners ask the Court to review is whether a provision of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a – a statute passed in 1982 based on a recommendation by the Reagan Administration to amend existing law to *limit* aspects of U.S. antitrust jurisdiction that had caused international friction – gives these plaintiffs the keys to U.S. courts to seek redress for injuries they claim to have suffered in the Ukraine, Australia, Ecuador, and Panama.

The provision that has caused the circuits such consternation, producing a three- or four-way circuit split (Pet. 8-12), is this (15 U.S.C. § 6a):

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect —

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[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

For 20 years after the statute's enactment, businesses like members of *amicus* have ordered their legal affairs with a settled understanding. Businesses have understood that the FTAIA's plain language precludes claims for purely foreign injury and that the FTAIA should be read in harmony with this Court's rules for antitrust injury. Those rules, as expressed in *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977), and its progeny, dictate that courts dismiss claims based on injuries that do not "flow[] from that which makes defendants' acts unlawful" (*id.* at 489) – *i.e.*, the *domestic* effects identified in the text of the FTAIA. During that period – which witnessed the transition of former command economies to market economies – international and multinational commerce flourished. See William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 361-363 (2000). Part of that economic story has been the creation of antitrust enforcement systems worldwide – such that in the years since 1950, when ours was the only "robust system of antitrust laws," scores of countries have developed antitrust regimes. *Id* at 362. Multinational businesses have learned to order their affairs based on the myriad regulatory schemes they face worldwide.

In the last 20 years, globalization of U.S. commerce has produced extraordinary benefits to the U.S. economy. During the prosperous 1990s, exports accounted for one-quarter of overall economic growth, and trade liberalization is credited with causing sustained economic growth during that decade. Secretary of Commerce Donald L. Evans, Remarks at the Meeting of the National Corngrowers Association (July 16, 2001), available at http://www.commerce.gov/opa/speeches/Evans/2001/July_16_Evans_Corn_Assoc.html.

The understanding that U.S. business and the U.S. antitrust enforcement agencies had of the reach of U.S. antitrust laws was well stated by the Fifth Circuit's decision in *Den Norske Stats Oljeselskap As* v. *HeereMac v.o.f.*, 241 F.3d 420, 428 (5th Cir. 2001): "[T]he FTAIA precludes subject matter jurisdiction * * * where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." In *HeereMac*, the Fifth Circuit affirmed dismissal for lack of jurisdiction of a claim brought by a foreign plaintiff claiming competitive injury in the North Sea – interpreting the FTAIA to require that the plaintiff bringing the lawsuit suffer domestic effects from the alleged anticompetitive conduct. *Id.* at 427-428.

Within the past year the balance in global antitrust enforcement has been upset twice by decisions from U.S. courts of appeals that impose U.S. antitrust laws and standards on international conduct. This result was never envisioned by Congress, and has not played into the risk calculations of businesses making the decision to engage in global commerce. See Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 7-8 (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf (*Delrahim Remarks*). First, the Second Circuit in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), cert. dismissed, 124 S. Ct. 27 (2003), and now the D.C. Circuit in the decision below, have interpreted the FTAIA to *permit* suit under U.S. antitrust laws by foreign plaintiffs claim-

ing injury suffered only abroad. Pet. App. 20a; *Kruman*, 284 F.3d at 390. According to the D.C. Circuit, both jurisdiction and standing can be supported by reference to an injury suffered by someone other than the plaintiff: "the plaintiff must" only "allege that *some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's" antitrust violation. Pet. App. 23a (emphasis added).

Dissenters from the interpretation of the FTAIA followed by the decision below include Judge Henderson of that court (Pet. App. 40a); Judges Sentelle and Randolph, who voted for *en banc* review (Pet. App. 44a); Judge Hogan, whose opinion the D.C. Circuit reversed (Pet. App. 45a); and Judge Kaplan of the Southern District of New York (*Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 624 (S.D.N.Y. 2001), rev'd, 284 F.3d 384 (2d Cir. 2002)). The U.S. government consistently has taken the position that *HeereMac*, not *Kruman* or the decision below, reflects the proper interpretation of the FTAIA. See Pet. 7; Pet. App. 67a; *Delrahim Remarks* 7 ("[W]e believe that *Kruman* and *Empagran* have profoundly disturbing policy implications."). Indeed, except for the misguided holdings of the court below and the Second Circuit, there is near unanimity of belief that – as a matter of statutory interpretation, antitrust policy, and international comity – U.S. law does not afford relief to foreign plaintiffs claiming foreign injury.

SUMMARY OF THE ARGUMENT

The flood of litigation that stands to be unleashed by the decision below – which opens the courts of the United States to foreign plaintiffs who suffered no injury in the United States – is by itself enough reason for this Court to grant certiorari. The distinctive features of the U.S. civil litigation system and the relative severity of U.S. laws will exert an inexorable pull on foreign plaintiffs seeking the most favorable forum for their claims. The inevitable flow of litigation to the United States is not justified by an increase in deterrence, as the D.C. Circuit uncritically assumed. Indeed, ratcheting up the exposure of

defendants in civil actions in U.S. courts *undermines* detection of cartel behavior, as the U.S. antitrust authorities and the Solicitor General advised the D.C. Circuit in vain.

Giving the class-action bar access to worldwide potential plaintiffs, for injury *not* suffered in the United States, is a recipe for disaster. "Blackmail settlements" (Judge Friendly's term) can only increase. The only reason there has not been *even more* of a rash of litigation than has already been spawned by the decision below and the Second Circuit's *Kruman* decision is that lawyers like respondents' counsel have been publicly telling potential plaintiffs to await this Court's action before suing.

There is no reason to await another case before resolving the issue cleanly presented by the petition. The hydraulic pressure to settle these massive cases makes it important for this Court to seize the opportunity to address one that has not settled.

International friction will inevitably result if the decision below stands. Expansive interpretations of U.S. antitrust jurisdiction have caused friction for decades, even with our closest trading allies. Other nations can and do protect their own citizens through antitrust or antitrust-like regimes, and there is no need or justification for the United States to substitute its forums and procedures for those nations' forums and procedures.

The holding below that foreign plaintiffs may sue for foreign injuries as long as "*some* private person or entity has suffered actual or threatened injury" in the United States, Pet. App. 23a (emphasis added), would open the U.S. courts to antitrust cases challenging conduct far different from the price fixing at issue in this case. Canadian consumers and competitors, for example, plainly would be able to challenge in U.S. courts the effects on intra-Canadian routes of the merger between Air Canada and Canadian Airlines. This Court, not a divided D.C. Circuit, should decide whether U.S. antitrust jurisdiction is to be so expansive, and whether the views of the Executive Branch in this sensitive matter of foreign relations are to be rejected.

On the merits, the Chamber urges reversal for all the reasons given by petitioners and the Solicitor General. In particular, even respondents concede that the FTAIA incorporates the "antitrust injury" principle of *Brunswick*, and that principle requires dismissal of claims that stem not from "that which makes defendants' acts unlawful" (429 U.S. at 489) – the acts' *domestic* effects – but from foreign effects that the FTAIA plainly states are *not* enough to constitute a violation of U.S. law.

ARGUMENT

I. The Decision Below Would Produce Overwhelming Burdens on U.S. Businesses, Would Flood U.S. Courts With Claims by Foreign Plaintiffs, and Has No Countervailing Benefits

U.S. courts long have been a favored forum for plaintiffs seeking the liberality of this Nation's damages laws and the generosity of American juries. See, *e.g.*, *Piper Aircraft Corp.* v. *Reyno*, 454 U.S. 235, 247 (1981) (rejecting plaintiffs' argument that more favorable U.S. products liability and wrongful death laws permitted suit in the U.S. for an airplane crash with no other connection to the United States). Although the business risk that litigation poses is by no means a story unique to this case or to the U.S. antitrust scheme, the FTAIA is one of the most important battlegrounds for plaintiffs' continuing efforts to realize the benefits of the U.S. forum instead of other, more appropriate forums.

A. The decision of the court below, combined with the *Kruman* decision from the Second Circuit, threatens a tidal wave of litigation by foreign plaintiffs who, before *Kruman*, could not sue for their injuries incurred wholly abroad (whether or not, in the D.C. Circuit's words, "*some* private person or entity has suffered actual or threatened injury" in the United States, Pet. App. 23a (emphasis added)).

The U.S. antitrust regime has many features that make suit in the United States attractive to foreign plaintiffs. The prospect of treble damages available under Clayton Act § 4, 15 U.S.C.

§ 15, is itself a substantial incentive. See Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 532 (2002). Other features include "extensive discovery, jury trials, class actions, contingent fees, and even potentially punitive damages." *Ibid.*; see also Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 516 (1998) ("[A]spects of American antitrust practice that are not often found outside the United States [include] jury trials, wide-ranging pretrial discovery without judicial supervision, enforcement by private plaintiffs, extraterritorial discovery, treble damages, class actions, contingent fees, [and] lack of contribution among co-conspirators.").

Taken together, those features provide compelling reasons to bring suit in the United States. "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd.* v. *Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning). *Kruman* and the decision below

> combine open U.S. jurisdictional rules, traditional treble damages, and broad U.S. notions of pre-trial discovery into a multi-color brochure for international antitrust tourism that will surely be – indeed, already is – irresistible to many foreign plaintiffs whose alleged injuries have little to do with cognizable U.S. interests. We do not think that is what U.S. antitrust law should be about.

Delrahim Remarks 17. Respondents' counsel clearly is aware of foreign plaintiffs' interest. See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003 (*Antitrust Goes Global*) (quoting respondents' counsel Paul Gallagher as saying that class actions, jury trials, contingent fees, and discovery are reasons why foreign plaintiffs seek U.S. courts).

In this Court, respondents' counsel characterize the conflict and confusion among the circuits as falling "at the margins of federal antitrust law" (Br. in Opp. 16). On the website of lead counsel, however, they were far more candid in highlighting the far-reaching effect of the decision below:

> [T]he full D.C. Circuit Court of Appeals, widely regarded as the most important appellate court below the Supreme Court, * * * ruled in [this case] that foreign plaintiffs may bring claims in U.S. Courts under U.S. antitrust laws * * * *even though the foreign plaintiffs' injuries did not arise from transactions in the United States.* * * * Paul Gallagher, a partner with Cohen, Milstein Hausfeld & Toll, P.L.L.C., counsel for the foreign plaintiffs and who argued the appeal said, "This is a major ruling in favor of the ability of foreign persons to vindicate their rights in U.S. courts against companies involved in international cartels. This ruling means that litigation against the vitamin manufacturers by foreign plaintiffs will continue in the trial court, with the vitamins defendants being exposed to potential damages in the billions of dollars. The implications to the vitamin defendants are enormous."

http://www.cmht.com/casewatch/cases/cwvitaminpr.html (visited Nov. 22, 2003). Likewise, respondents' counsel discussed the generalized ramifications of the D.C. Circuit's result. "'It's a very, very significant case in terms of the implications for both domestic and foreign companies that do business in the United States,' says Paul T. Gallagher, the plaintiff's lawyer. * * * 'It really increases the potential downside, the potential damages that a foreign defendant is exposed to in a U.S. court.'" Michael Freeman, "Here Comes Treble," *Forbes*.com, Aug. 27, 2003, available at http://www.cmht.com/casewatch/cases/itnTreble.html.

The raft of ill effects from the exceptionally liberal rule adopted by the court below was understood by the Fifth Circuit in *HeereMac*, 241 F.3d at 427-428: "[A]ny entities, anywhere, that were injured by any conduct that also had sufficient effect

on United States commerce could flock to the United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States."

B. Contrary to the conclusion of the court below (Pet. App. 30a-33a), the harms discussed above are not outweighed by possible benefits of increased deterrence. The court's deterrence rationale has no logical upper limit. If the goal of the FTAIA truly is to deter certain types of conduct at all costs, the punitive scheme might be extended up to and including imposing a corporate "death penalty." Compare Thomas Greene & Robert L. Hubbard, *State Antitrust Enforcement Distribution Restraints*, in PLI 42d Annual Advanced Antitrust Seminar 1289, 1297 (2003) ("A number of states also have corporate 'death penalties' whereby a corporation's charter can be revoked for antitrust violations."). One struggles in vain to understand why the D.C. Circuit thought payment of thrice the damages stemming from the U.S. effects of the conspiracy, *plus* criminal fines, *plus* enormous civil penalties in other countries (see Pet. 5), *plus* such damages as may be available to private plaintiffs under the laws of other countries, is insufficient deterrence.

Rather, as the Solicitor General argued to the court below, opening the U.S. courts to all those with claims based on purely foreign injury would have the perverse effect of decreasing incentives for firms to break from cartels, because the increased potential civil liability in cases like this one will be impossible to bear. The corporate leniency policy followed by the Antitrust Division (Pet. App. 78a) eliminates the threat of criminal prosecution for a cooperating corporation and its officers who break from, and disclose, a cartel. *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113, at 20,649-21, 20,649-22 (Aug. 10, 1993). See *In re Sotheby's Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 91,059, 2000 WL 1234601, at *3 (S.D.N.Y. Aug. 31, 2000) (noting that Christie's International PLC disclosed the price-fixing agreement, later the subject of a certiorari petition

(No. 02-340) raising the same issue as this case, under the Antitrust Division's corporate leniency policy).

The corporate leniency policy has been considered highly effective. "This [FTAIA] issue has arisen precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years." Assistant Attorney General R. Hewitt Pate, *Anti-Cartel Enforcement, the Core Antitrust Mission* 10 (May 16, 2003), available at http://www.usdoj.gov/atr/public/speeches/201199.pdf. See also Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 270-271 (2003) (crediting the policy with the majority of U.S. cartel enforcement successes in recent years). To the extent that the fear of private treble-damages liability under 15 U.S.C. § 15 is greater than the fear of criminal prosecution, the leniency policy will be ineffective.[2]

C. The plaintiffs' bar in this country – not ill-used foreign plaintiffs – drives purported international class actions. Recognition of the power of the class-action device is not new, and not limited to cases involving worldwide treble-damages classes. This Court and myriad lower federal courts and commentators have discussed the effect that class certification has on litigation. "Certification of a large class may so increase the defendant's potential economic damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Class certification presents such pressures because defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhône-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Class actions have been described as "judicial weapons of mass destruction. These suits promise such devastating consequences that even the most innocent of defendants must settle or risk total destruction." *Mass Torts and Class-Action Lawsuits: Oversight Hearings Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property*, 105th Cong. (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh), available at http://www.house.gov/judiciary/41156.htm. Judge Friendly termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

[2] A bill currently under consideration in Congress would increase criminal penalties for cartel behavior. The same bill would *reduce* damages recovery in certain private suits to "address[] a major disincentive that currently confronts companies who are contemplating exposing cartel activity to the Division – the threat of treble damage lawsuits * * *. Of course, without cartel detection, the potential compensation to consumers harmed by antitrust crime is zero." *Delrahim Remarks* 15-17.

The power of the class-action device takes on entirely new meaning in the context of worldwide classes.[3] If the interpretations of the FTAIA adopted in *Kruman* and the decision below stand, it is fair to expect that plaintiffs' class counsel will take global the search for class action plaintiffs. In the specific case of the litigation that spawned the petition, this is occurring. "Already, some lawyers have begun to cast their nets for clients, hopping planes to places as far afield as the Czech Republic to look for purchasers who bought vitamins from cartel members." *Antitrust Goes Global*, *supra*.

Given this reality, it is disingenuous for respondents to argue to this Court that there has not been an outpouring of litigation resulting from the D.C. Circuit's reading of the FTAIA. Br. in Opp. 15. There *has* been substantial litigation raising this issue (see Pet. 12 n.3). That there has not been *even more* stems to a degree from the control respondents' counsel themselves possess over the floodgates. A recent interview with plaintiffs' counsel in these cases demonstrates that fact: "Kenneth Adams, the Dickstein partner who spearheaded the

[3] Respondents' counsel in this case have trumpeted their success in bringing into the U.S. antitrust class-action fold billions of potential worldwide plaintiffs. Referring to the settlement in *Kruman*'s, the firm notes on its website: "This settlement marks the first time that claims on behalf of foreign plaintiffs under U.S. antitrust laws have resolved in a U.S. court, a milestone in U.S. antitrust jurisprudence." http://www.cmht.com/casewatch/antitrust/auctions.html (visited Nov. 22, 2003).

firm's vitamin litigation, says he's been contacted by a host of foreign plaintiffs, but has advised them to wait until the appeals in Empagran have run their course before filing suit." *Antitrust Goes Global*, *supra*.

The wave of treble-damages suits that the decision below allows, if its interpretation of the FTAIA stands, will severely harm the American business community, including large numbers of Chamber members. Allowing foreign plaintiffs whose injuries arise from foreign effects to sue in the United States can increase potential liability by millions, if not billions, of dollars. This reality is exemplified by the graphic electrodes case pending before the Third Circuit (see Pet. 12), and by the settlement in *Kruman* before this Court could consider the issue (Pet. 10). Even those who support the FTAIA reading followed by the court below, and the even more expansive reading in *Kruman*, note the far-ranging impact of the decisions. See, *e.g.*, Ronald W. Davis, *International Cartel & Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, ANTITRUST, Summer 2001, at 53, 57 ("[T]he mind boggles at expanded class action proceedings, where counsel for purchasers in Alabama and Texas sit at the counsel table with attorneys for subclasses of purchasers in Albania and Tajikistan.").

D. Respondents' argument that the Court should wait until "[o]ther federal law questions that will be addressed on remand" are staged for this Court's review (Br. in Opp. 7-8) is utterly disingenuous. If the Court denies certiorari, it is exceedingly unlikely that the FTAIA issue will be presented to the Court as part of this litigation. Indeed, in *Kruman*, the certiorari petition was dismissed when the parties settled, rather than face continued uncertainty. Pet. 10. For the same reason, the Court should not wait for the pending cases respondents cite (Br. in Opp. 14) to present themselves for review. Preliminarily, *MM Global Servs.* v. *Dow Chem. Co.*, 283 F. Supp. 2d 689 (D. Conn. 2003), is controlled by *Kruman*. And experience teaches that, in light of the hydraulic pressures to settle, these cases might never make it as far as an appellate decision – much less a certiorari

petition. The present case offers a golden opportunity for this Court to settle an issue of profound economic and foreign-relations significance, and the Court should seize the opportunity and not await some other case.

The Court should not wait for the Third Circuit's decision in the *UCAR* appeals (Pet. 12 n.3). That case, arising out of an alleged worldwide conspiracy to fix prices and allocate markets for graphite electrodes, involves a particularly lopsided ratio of foreign injury to domestic injury. The district court reduced the defendants' post-trebling liability in the United States on one part of that case from $687 million to $54 million after dismissing the foreign plaintiffs' claims for injury abroad. *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 706 (E.D. Pa. 2001), appeal pending, No. 01-3329 (3d Cir.); see also 153 F. Supp. 2d at 703 (noting an even more lopsided ratio in different aspect of the case). That lopsided ratio shows the dramatic effects of an erroneous decision to accept the rule the D.C. Circuit accepted, but it does nothing to make the case any more suitable a vehicle than this one for deciding the clean legal issue presented in the petition.

II. The Decision Below Undermines the Enforcement Authority of Other Countries' Antitrust Agencies and Risks Creating Political Conflict

A. This Court has noted that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Yet the expansive reading of the FTAIA adopted below imposes U.S. antitrust law – and, in particular, the internationally controversial judgments of U.S. lawmakers concerning class-action procedures and enhanced damages for antitrust violations – on the global community. Rejecting that reading of the FTAIA, the district judge whose opinion the Second Circuit reversed aptly stated that such a reading "impute[s]

to Congress an intention to establish an antitrust regime to cover the world." *Kruman*, 129 F. Supp. 2d at 624.[4]

Expansion of U.S. antitrust jurisdiction is certain to upset foreign governments. "Other countries have for decades protested the perceived aggression with which the United States has imposed its competition laws abroad." Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 249 (2001); see 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.16 (5th ed. 1996) ("[f]oreign nations, including close allies of the United States, have protested the assertion of U.S. extraterritorial jurisdiction").

In the face of this perceived aggression, those governments do not rest idle. "Foreign governments have reacted with vehemence towards the extraterritorial enforcement of U.S. antitrust laws in a number of circumstances. * * * [P]olite diplomatic notes of concern and diplomatic notes of protest have been supplemented by various foreign 'blocking' statutes." Joseph P. Griffin, *supra*, 6 GEO. MASON L. REV. at 505. One such "blocking statute," the United Kingdom Protection of Trading Interests Act of 1980 (PTIA), creates obstacles to foreign discovery by allowing the Secretary of State for Trade to block a request for documents or other discovery made by a foreign authority. PTIA § 2, 21 I.L.M. 834, 835 (1982). And the PTIA allows British citizens to avoid paying foreign judgments by allowing the Secretary of State for Trade to prevent enforcement of foreign judgments for multiple (treble) damages. PTIA § 5, *id.* at 837. Another section takes the United Kingdom's resistance to treble damages one step further, creating a cause of action for persons doing business in the United Kingdom to sue for two-

[4] The Antitrust Division specifically has rejected this view. "[Courts'] antitrust jurisdiction and processes should continue to focus, as they traditionally and successfully have * * *, on protecting U.S. commerce, U.S. consumers, and competition in U.S. markets." *Delrahim Remarks* 17.

thirds of a foreign treble-damages antitrust judgment. SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4:17, at 4-34 & -35 (3d ed. 1997); PTIA § 6, 21 I.L.M. at 837-838.

These provisions arise from a significant policy difference with the United States. See A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 277 (1981) ("the unenforceability of competition judgments 'reflects the principle whereby sovereign states do not accept an obligation to enforce the public economic policies of other sovereign states'") (quoting 973 Parl. Deb., H.C. (5th ser.) (1979) 1546). Unlike the United States, the British Government considers multiple damage awards penal, and will not enforce them. See, *e.g.*, United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill (Nov. 27, 1979), 21 I.L.M. 847, 849 (1982). The British Government, in addition, does not agree with encouraging private citizens to act as private attorneys general. As that government has explained, the U.S. policy replaces "the usual discretion of public authority to enforce laws in a way which has regard to the interests of society" with "a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature." *Ibid.* In addition, "where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy." *Ibid.*

But the tensions between the United States and the United Kingdom in this arena are not unique. Other countries also have adopted statutes with provisions similar to those contained in the PTIA. Canada, the Netherlands, Australia, Germany, France, and New Zealand have statutes that block foreign discovery. WALLER, *supra*, § 4:16; 1 FUGATE, *supra*, § 3.11. These blocking statutes "were directed principally at American antitrust enforcement." WALLER, *supra*, § 4:16. Australia and Canada have statutes that allow blocking of the enforcement of foreign antitrust judgments. *Id.* § 4:17. Australia's and

Canada's statutes also contain "clawback" provisions that create the right to sue to recover money paid under a foreign antitrust judgment that is deemed unenforceable. *Ibid.* "When a country's allies begin competing with each other in enacting legislation directed at frustrating, and indeed retaliating against, actions of the first country, conflict and resentment is clear." *Id.* § 4:19.

Australia is particularly pertinent to the FTAIA issue raised by the petition, because it is the situs of some of the alleged injury in this case. Furthermore, as any weekly reader of BNA's Antitrust and Trade Regulation Report can attest, Australia has one of the world's most active antitrust enforcement authorities. Australia and the United States have entered into an agreement (see *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance* (April 27, 1999), available at http://www.usdoj.gov/atr/public/international/docs/usaus7.wpd) to facilitate the exchange of confidential information during the course of civil or criminal antitrust investigations pursuant to the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6200-6212. As long ago as 1982 – the year the FTAIA was passed – Australia had an agreement relating to cooperation on antitrust matters with the United States. See *Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters* (Jun. 29, 1982), available at http://www.usdoj.gov/atr/public/international/docs/austral.us.txt. Given this history of cooperation, one can safely infer that Australia's hostility is not to the *substance* of U.S. antitrust laws, but to the efforts of the United States to dictate to other countries how their citizens will be compensated (as plaintiffs) or regulated and punished (as defendants). This case, in which foreign plaintiffs seek to recover from foreign defendants for foreign injuries – just because *someone else* felt an injury in the United States from the same conduct – arises at the apex of concern by friendly U.S. trading partners about U.S. unilateralism in antitrust matters. "As part of our efforts to

enhance our international efforts towards cooperation on cartel enforcement, many countries pointed to the impact of *Empagran* for their reluctance to enter into information sharing pacts with the United States." *Delrahim Remarks* 10.

This country should not unthinkingly impose its antitrust laws and policy choices on the rest of the world. That is particularly true when the decisions are not the considered policy judgment of Congress or the Executive Branch, but actually fly in the face of the views of those charged with enforcing the antitrust laws. Pet. 7-8; *Delrahim Remarks* 7-10. The United States has encouraged other nations to adopt and enforce antitrust laws. See Kovacic, *Lessons*, *supra,* at 362. "We now live in a world where there are nearly 100 jurisdictions with antitrust laws of one sort or another, from Albania to Zambia, where both foreign governments and foreign firms take antitrust seriously." *Delrahim Remarks* 2. Three of the four sovereign nations where the effects alleged in this case occurred – the Ukraine, Australia, and Panama – have their own antitrust authorities. See http://www.globalcompetitionreview.com/home/links.cfm (visited Nov. 23, 2003). The United States "should be hesitant to skew the development of other countries' antitrust regimes, private and public, by encouraging a dependence on U.S. treble damage actions for the redress of antitrust injuries." *Delrahim Remarks* 8.

B. The result below is not in any way limited to major international cartels like those alleged in *Kruman* and this case. Challenges to run-of-the-mill business transactions, between foreign companies that also transact business in the United States, threaten to become a staple of U.S. District Court dockets. In 2000, Canada's two major air carriers – Air Canada and Canadian Airlines – merged into one company. As a result, routes throughout Canada, and routes between Canadian and U.S. origins and destinations, were faced with a diminution in the number of competitors, and thus perhaps a diminution in competition, under traditional understandings of U.S. antitrust doctrine. See U.S. Department of Justice, Horizontal Merger

Guidelines ¶ 2.0 ("Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power."). Concerns for competitive effects in Canadian air markets have appropriately been the subject of inquiry by Canada's Competition Tribunal. See, *e.g.*, *Commissioner of Competition* v. *Air Canada*, 2003 Comp. Trib. 13 (Jul. 22, 2003). And Canadian plaintiffs have availed themselves of Canada's antitrust regime to protect their interests in markets where the dominant Air Canada firm competes. See *ibid.* (intervention by WestJet Airlines, Ltd.).

Likewise, where Air Canada competes in U.S. markets, it has been subjected to suits by plaintiffs claiming injury from activities in those markets. See, *e.g.*, *Air Freight Haulage Co.* v. *Ryd-Air, Inc.*, 1978-2 Trade Cas. ¶ 62, 321 (S.D.N.Y. 1978) (dismissing antitrust suit against defendants including Air Canada). Under any reading of the FTAIA, plaintiffs claiming injury in the United States flowing from the Air Canada-Canadian Airlines merger would have a basis to sue in U.S. courts. For example, a U.S. plaintiff reliant on air service in a route – such as Toronto to Washington, D.C. – where Air Canada and Canadian Airlines previously competed clearly had a cause of action under U.S. antitrust law to contest the merger. See 15 U.S.C. § 15 (permitting private damages actions for violations of the antitrust laws); *Midwest Machinery, Inc.* v. *Northwest Airlines, Inc.*, 167 F.3d 439 (8th Cir. 1999) (allowing private damages action to challenge consummated airline merger).

But the rule adopted below substantially broadens the range of possible antitrust lawsuits. Under that interpretation of the FTAIA, Canadian consumers or competitors could sue in the United States for harm they claim to have suffered on intra-Canadian routes – so long as "*some* private person or entity has suffered actual or threatened injury" in the United States as a result of the merger. Pet. App. 23a (emphasis added). In the Chamber's view, such a *reductio ad absurdum* – and the obvious affront to Canada that it entails – is practically enough by itself to show the D.C. Circuit's error *on the merits*. In any event,

such an untoward result should not be allowed to result from a 2-1 D.C. Circuit decision, denied rehearing en banc by a 4-3 vote, contrary to the views of the Executive Branch. Even if such a result is somehow correct, this Court has a responsibility to announce the governing rule itself, not allow tremendous international friction to result from the votes of a small number of D.C. Circuit judges.

III. The Worldwide Standing Rule that the D.C. Circuit Propounded Has No Basis in This Court's Law and Undermines Congress's Intent in Enacting the FTAIA

On the merits, the Chamber agrees with the arguments in the petition and in the *amicus* brief filed by the Solicitor General in support of rehearing below. The Chamber can therefore state its own views in abbreviated form.

A bedrock principle of U.S. antitrust law is that "a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick*, 429 U.S. at 489). Plaintiffs injured in foreign countries by the foreign effects of defendants' alleged price-fixing activities neither suffer injury of the type the American antitrust laws were intended to prevent nor suffer injury that flows from that which makes defendants' acts unlawful. That which makes defendants' acts unlawful is the domestic effects, not the foreign effects, of defendants' activities. Under black-letter "antitrust injury" doctrine, respondents are not proper plaintiffs under the U.S. antitrust laws.

The legislative history of the FTAIA has been the subject of some debate among the various courts considering this issue, and among the briefs before this Court. Compare Pet. 14-15; *HeereMac*, 241 F.3d at 428-429 & n.25; *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis.

2000), with Br. in Opp. 23 & n.13; Pet. App. 24a. But there is no debate about Congress's intent in the arena of antitrust standing: "[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." H.R. REP. NO. 97-686, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

Remarkably, *respondents* read the FTAIA as importing the *Brunswick* rule. Br. in Opp. 22 ("Clause 2 imports the requirements of 'antitrust standing' that a plaintiff may recover only for 'injur[ies] of the type the antitrust laws were intended to prevent.'") (quoting *Brunswick*, 429 U.S. at 489). Respondents thus correctly understand that the FTAIA left unchanged the antitrust injury doctrine this Court clearly stated in *Brunswick* (Br. in Opp. 22), but incorrectly interpret the decision below to accord with the *Brunswick* rule. Indeed, the Court need look no further than *Brunswick* to resolve the legal issue that has split the circuits. *Brunswick* makes clear that any one antitrust violation gives rise to claims by some plaintiffs, while it does not give rise to claims by others. Antitrust standing turns on the nature of the injury incurred by *the party seeking access to the courts* – not the fact of antitrust injury in a vacuum. For this reason, along with those petitioners and the Solicitor General have stated, the judgment below should be reviewed and reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, ET AL.,
Petitioners,

v.

EMPAGRAN, S.A., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. THE COURT OF APPEALS' DECISION INTERFERES WITH FUNDAMENTAL SOVEREIGN CHOICES THAT OTHER NATIONS HAVE MADE ABOUT THE REGULATION OF THEIR OWN INDUSTRIES AND COMMERCE 5

A. United States Legal Principles Respect The Jurisdiction Of Other States 5

B. Proper Application Of The "Effects" Test Respects International Sovereignty Interests 5

C. The Decision Below Intrudes On Foreign Sovereignty Interests That Reject Aspects Of U.S. Antitrust Law 7

II. THE COURT OF APPEALS' DECISION THREATENS TO UNDERMINE INTERNATIONAL ANTITRUST ENFORCEMENT 11

A. Foreign Concerns About U.S. Exercises Of Extraterritorial Jurisdiction Have Produced Statutory Counter-Reactions 11

B. The Decision Below Impinges On Governmental Leniency Policies 14

III. BECAUSE OTHER COUNTRIES FOLLOW THE EFFECTS DOCTRINE AND VIGOROUSLY APPLY THEIR COMPETITION LAWS, THERE IS NO NEED FOR U.S. ANTITRUST LAWS TO APPLY EXTRATERRITORIALLY TO PLAINTIFFS INJURED ONLY IN FOREIGN COMMERCE 16

A. Other Countries Vigorously Enforce Against Antitrust Abuses 16

B. Adherence To The Effects Doctrine By Other Countries Produces Sound International Antitrust Enforcement 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

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INTEREST OF *AMICUS CURIAE*[1]

The Federal Republic of Germany has one of the world's most advanced and extensive legal regimes to protect against economic competition abuses. Under its Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or *GWB*),[2] Germany prohibits "[a]greements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition." GWB § 1. That law "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Germany's enforcement efforts and merger review procedures have been evaluated as being "at the top of the European rankings" and "second overall behind the US." *Rating Enforcement Survey*, Global Competition Review, June 2003, at 22. In 2002 alone, German competition authorities conducted a dozen investigations into significant cartels, raided some 170 companies and homes of executives in the course of its investigations, and reviewed more than 1,500 mergers. *Id.* at 22-23. Since the beginning of 2003, the Federal Cartel Office (*Bundeskartellamt*) has levied more than €660 million in fines against companies and executives involved in cartels. Such efforts have been recognized by the Organization for Economic Cooperation and Development ("OECD") as sending a clear message about the importance of competition while permitting efficient cooperation.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief, and letters reflecting their consent have been filed with the Clerk.

[2] Both the original German version and the English translation of the GWB are available at http://www.bundeskartellamt.de/competition_act.html.

As a Member State in the European Union ("EU"), Germany also provides political, economic, and enforcement support for the EU's competition laws, which, in conjunction with Member States' national competition laws, operate as a dual enforcement system in Europe. Like Germany, the EU vigorously pursues cartels, levying more than €1.839 billion in fines during 2001 and €950 million during 2002. *See The Fight Against Cartels: Statistics, available at* http://europa.eu.int/comm/competition/citizen/cartel_stats.html.

Petitioners in this case include German companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales. *See* Pet. 5. Germany participated in EU enforcement efforts that produced €855 million (approximately US$1 billion) in fines against companies petitioning for certiorari in this case. Germany has significant economic and political interests in ensuring that companies based in Germany comply with German and EU competition laws, and in protecting against the encroachment of other countries' laws on those enforcement efforts. Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs seeking treble damages in private lawsuits against German companies. Accordingly, Germany has a substantial interest in the proper construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a.

STATEMENT

Petitioners are foreign and domestic manufacturers and distributors of vitamins. Respondents are foreign corporations domiciled in foreign countries that purchased vitamins from petitioners in foreign markets. Respondents' class action alleges that petitioners conspired to fix prices and allocate market share in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. §§ 15 and 26.

The district court dismissed respondents' federal antitrust claims for lack of subject matter jurisdiction. Pet.

App. 46a. The court noted that the "critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at 48a. That question required the court to consider a provision of the FTAIA, 15 U.S.C. § 6a, which provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce," and "such effect gives rise to a claim under the provisions of sections 1 to 7 of this title." Pet. App. 48a (quoting 15 U.S.C. § 6a). The district court concluded that, because respondents had purchased vitamins solely in foreign markets, they had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case." *Id.* at 49a.

Respondents appealed. They contended that the FTAIA does not restrict jurisdiction to the same claim on which the jurisdictional effects are based. In respondents' view, the claims of foreign plaintiffs did not need to arise out of the alleged conspiracy's effects on the United States so long as some claims by injured persons exist that would arise from such domestic effects. *Id.* at 2a-3a. The court of appeals agreed and reversed, holding that, "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Id.* at 4a. The court opined that it is sufficient for jurisdiction if the conduct "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* In so ruling, the court relied on a "literal reading of the statute," as well as the FTAIA's legislative history and "underlying policies of deterrence" that it gleaned from *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision incorrectly interprets the FTAIA in a manner that does grave harm to the antitrust enforcement efforts of other countries. The court's interpretation drastically expands the extraterritorial reach of the United States' antitrust laws to situations in which the conduct and the alleged anticompetitive effects suffered by foreign plaintiffs occur only in foreign countries. Yet, in those situations, other nations have jurisdiction to regulate or prohibit that conduct. The court's holding thus directly conflicts with the well-established principle that United States statutes are to be construed to avoid conflict with other nations' laws and to avoid unreasonableness in the exercise of U.S. courts' jurisdiction. *See Restatement (Third) of Foreign Relations Law of the United States* § 403 cmt. g, at 248 (1987) ("*Restatement (Third)*").

This Court's review is warranted to prevent foreign civil litigants from using United States lawsuits to interfere with the policy choices made by foreign governments about the most appropriate means of bringing foreign companies into compliance with foreign competition laws. The court of appeals' interpretation of the FTAIA threatens to undermine international antitrust cooperation and enforcement. Foreign governments use leniency programs to obtain information about violations that then leads to deterrence of other abuses. Yet private suits, such as respondents', create strong disincentives for companies to participate in such programs because to do so increases the risk that the information they disclose to governments will subject them to private civil liability and treble damages. The question whether Congress intended in the passage of the FTAIA to extend federal court jurisdiction in such a significant way is of enormous importance to international commerce and diplomacy.

I. THE COURT OF APPEALS' DECISION INTERFERES WITH FUNDAMENTAL SOVEREIGN CHOICES THAT OTHER NATIONS HAVE MADE ABOUT THE REGULATION OF THEIR OWN INDUSTRIES AND COMMERCE

A. United States Legal Principles Respect The Jurisdiction Of Other States

Principles of both United States and international law require that nations respect the sovereign interests of other nations before exercising their jurisdiction extraterritorially. United States law recognizes that, "[w]here regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place." *Restatement (Third)* § 403 reporter's note, at 250. International law is to the same effect. For example, the OECD urges its members to "take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries," and calls for "cooperation as an alternative to unilateral action." OECD, Comm. on Int'l Investment and Multinat'l Enters., *The 1984 Review of 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises*, approved May 18, 1984, OECD Doc. Press/A(84).

B. Proper Application Of The "Effects" Test Respects International Sovereignty Interests

Those general principles of law apply to antitrust regulation. Countries such as Germany are in general accord with United States law in limiting enforcement of competition laws only to those foreign actions that have "effects" in Germany. Rulings by United States courts that expand the effects doctrine and thereby apply the United States' antitrust laws to foreign nationals and foreign conduct have rightly been criticized "on grounds of foreign relations, international law or comity, often by the U.S.'s closest allies." Mark R. Joelson, *An International Antitrust*

Primer 54 (2d ed. 2001). *See also* I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.16, at 126-27 & n.2 (5th ed. 1996) (cataloguing cases where foreign governments have protested and disputed "the jurisdiction of United States courts over their nationals or over the activities of their nationals outside of the territorial boundaries of the United States"); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 159 (1999) ("aggressive unilateral enforcement continues to provoke conflicts among close trading partners and to create uncertainty for transnational firms").

In applying the effects test, United States courts have properly exercised discretion when an expansive application of U.S. law would intrude on the interests of foreign sovereigns that also are seeking to enforce their own competition laws against the very same companies. *See* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272d, at 353 (2d ed. 2000). When the requisite effects of a foreign defendant's action on American commerce are negligible, "the court may wish for reasons of prudence, policy, comity, or economy not to proceed further." *Id.* ¶ 273c, at 374. That type of judicial restraint is critical to the comity that should be afforded between nation-states. As Judge Learned Hand counseled, United States jurisdiction should be invoked with "regard to the limitations customarily observed by nations upon the exercise of their powers." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). *See also Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (construing Jones Act "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law").

That type of judicial restraint is well recognized under United States law. The *Restatement (Third)* observes that, "[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction

is unreasonable." *Restatement (Third)* § 403(1), at 244. Among the factors bearing upon the reasonableness of the exercise of jurisdiction are "the extent to which other states regulate such activities," § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," § 403(2)(g); and "the likelihood of conflict with regulation by another state," § 403(2)(h).

These factors counsel against an exercise of U.S. jurisdiction in this case based on a notion of "reasonableness." The most important factors – primacy over a given transaction, the locus of the conduct, the locus of that conduct's effects, and the strength of the foreign state's policies that bear on the problem – all point to countries *other than* the United States. *See* IA Areeda & Hovenkamp, *supra*, ¶ 276, at 413. The foreign respondents' purchases of vitamins in foreign commerce do not give the U.S. primacy over those transactions.

C. The Decision Below Intrudes On Foreign Sovereignty Interests That Reject Aspects Of U.S. Antitrust Law

The court of appeals' application of the United States' antitrust laws to foreign plaintiffs that purchased vitamins exclusively in foreign commerce interferes with the sovereign interests of other nations. The court failed to give proper consideration to the legitimate choices those nations have made concerning the regulation of their own commerce and competition in their own industries. It failed to recognize, too, that there often are "important differences between domestic and international markets in . . . the environmental circumstances bearing upon the 'reasonableness' of a given restraint" on trade. IA Areeda & Hovenkamp, *supra*, ¶ 273, at 372.

Some of those differences between the U.S. and German legal systems are well known. Like many other countries, for example, Germany does not provide for trebling of private antitrust damages awards. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26

Yale J. Int'l L. 219, 251 (2001) (treble damages are "one of the most unacceptable aspects of U.S. regulatory law"); *see also* Pet. 23. Indeed, the fact that the court of appeals' decision opens the door to foreign plaintiffs who seek treble damages is especially troublesome. Private plaintiffs rarely exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments that mark actions brought by the United States government. *See* Griffin, *supra*, 67 Antitrust L.J. at 194.[3]

Other controversial features of the U.S. legal system include extensive discovery, jury trials, class actions, contingent fees, and punitive damages. *See* Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523, 532 (2002); Joelson, *supra*, at 6 ("treble damage awards, contingency fees, and class action procedures . . . have little support elsewhere"). Furthermore, the "Court of Justice has emphasized that [EU competition law] is not the same as the Sherman Act in that there are no per se violations" under EU law. Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519.

In addition to the foregoing characteristics that differentiate the United States legal system from those of other countries, Germany approaches competition law in certain respects in a manner quite different from the United States. Although Germany allows private parties to enforce aspects of its competition law in certain circumstances through claims for damages, *see* GWB § 33, a fundamental difference between our two systems is that German antitrust law is applied principally through adminis-

[3] "If the U.S. courts permit forum-shopping by foreign entities where the dispute has little causal connection with the U.S., then that can only operate to the detriment of other antitrust enforcement systems which may take a different view on matters such as treble damages and contingency fees." Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 Loy. Consumer L. Rev. 509, 512 (2002).

trative bodies, whereas the courts play the primary role in the United States. *See* Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, *available at* http://www.antitrust.de/kartellrecht.htm. Moreover, although petitioners' activities in this case clearly were prohibited under both EU and German competition laws and were severely punished by the EU authorities, Germany exempts certain other cartels from enforcement altogether – *e.g.*, "rationalisation cartels" (*Rationalisierungskartelle*, GWB § 5) and "structural crisis cartels" (*Strukturkrisenkartelle*, GWB § 6). *See* II Fugate, *supra*, § 16.9, at 566 ("There are broad exemptions provided . . . for particular types of cartels such as rationalization cartels organized to take advantage of technical improvements in an industry.").

Likewise, certain agreements "which contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods, while allowing consumers a fair share of the resulting benefit, can be exempted from § 1 GWB." Joachim Rudo, *The 1999 Amendments to the German Act Against Restraints of Competition*, *available at* http://www.antitrust.de/gwb-amendment.htm. The United States' antitrust laws do not recognize similar exemptions from criminal prosecution under the Sherman Act, let alone from suits by private plaintiffs who allege that they were injured by the foreign anticompetitive effects of such cartels. Allowing such suits to go forward in U.S. courts undermines Germany's sovereign choice to encourage these agreements. By applying the United States' antitrust laws in cases where neither the plaintiff nor the alleged harm has direct effects on United States commerce, the court of appeals' decision fails to respect the fundamental right of foreign sovereigns to regulate their own markets and industries.

Our point is not that German enforcement is any less vigorous than American efforts. In some ways, German competition law is stricter than United States law; in other ways, less strict. Hard-core cartels like the one

charged in the vitamin case are illegal and subject to vigorous prosecution in both countries. However, the structure of the competition laws of Germany and the U.S. differs. For example, in the U.S., agency practice and courts decide whether certain agreements restraining competition are illegal by applying a "rule of reason" analysis. By contrast, the German system contains a basic prohibition against cartels (GWB § 1), with enumerated exceptions (GWB §§ 2-8). Irrespective of whether a different outcome may result under the two systems, U.S. law should not trump Germany's sovereign decision to make its own choices about how to structure and apply its competition laws in determining liability and imposing remedies.

Accordingly, the U.S. Deputy Assistant Attorney General for Antitrust has recognized that "the United States is not alone in today's antitrust world; we are joined by nearly 100 other jurisdictions, many of them with effective court systems, and as they have considered their system of enforcement, some have found it fit, as a matter of domestic policy, to provide for certain private rights of action and some have not." Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Speech Before the American Bar Association Section of Antitrust Law, Washington, D.C. (Nov. 18, 2003), at 7, *available at* http://www.usdoj.gov/atr/public/speeches/201509.htm. Permitting suits such as respondents' encroaches directly on contrary sovereign choices made by Germany, particularly where, as here, the German authorities are treating the vitamin case as a hard-core cartel that would not be subject to an individual exemption but which may entail different remedies than those that would be imposed under the U.S. system.[4]

[4] Under the German system, administration agency officials make individualized factual and legal determinations about the compliance of companies with German law. The pertinent competition authority analyzes requests for individual exemptions. That difference in approach is also markedly different – with respect to the rights of German companies – than the U.S. system's primary reliance on judicial enforcement.

II. THE COURT OF APPEALS' DECISION THREATENS TO UNDERMINE INTERNATIONAL ANTITRUST ENFORCEMENT

The investigation and prosecution of global conspiracies in restraint of trade often depends upon the cooperation and coordination of countries where the offenders might be domiciled or located. For that reason, the United States has entered into cooperative treaties or agreements with other nations, including the Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291. *See also* Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, 34 U.S.T. 388, T.I.A.S. No. 10365; Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted at* 4 Trade Reg. Rep. ¶ 13,503. *See generally* IA Areeda & Hovenkamp, *supra*, ¶ 275, at 411 n.6. Left unchecked, the court of appeals' decision threatens to undermine those efforts.

A. Foreign Concerns About U.S. Exercises Of Extraterritorial Jurisdiction Have Produced Statutory Counter-Reactions

Respondents argue that "petitioners are simply not correct in asserting that the D.C. Circuit's decision will undermine this nation's relationships with its trading partners," and that there will be no ill effects on international antitrust enforcement. Opp. 24-25. History and common sense teach that this is not so. As Deputy Assistant Attorney General Delrahim has stated, "the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties

of foreign countries." Delrahim, *supra*, at 8. Such encroachments by U.S. courts invariably will alter the relationships between nations. The effectiveness of international treaties and arrangements is threatened when other nations conclude that the U.S. has overreached in the application of its domestic laws to foreign conduct. *See* Buxbaum, *supra*, 26 Yale J. Int'l L. at 252.

German officials already have expressed concern about the court of appeals' expansive application of U.S. jurisdiction in this case. In a recent lecture given at an antitrust conference in Bonn and attended by United States and EU officials, former German Economic Minister (and recent chief German negotiator of the German-U.S. forced labor settlement) Otto Graf Lambsdorff commented on the *Empagran* decision. Mr. Lambsdorff opined that "American antitrust laws were created to protect the American consumer and not to regulate the competitive conditions in foreign countries," and observed that "[a] German court – as well as every other European – would obviously deny jurisdiction" were the roles reversed, because "[a]ny other decision would rightly provoke protest by both US companies and the US government." Antitrust Law as a Regulatory Factor in a Globalized Market Economy, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany, at 3 (June 19, 2003) (hereinafter "Bonn Lecture").

A realistic consequence of foreign disapproval with U.S. encroachments on other nation-state's antitrust enforcement efforts will be a refusal to enforce judgments obtained in U.S. lawsuits. "States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant." *Restatement (Third)* intro. note, at 304; IA Areeda & Hovenkamp, *supra*, ¶ 275, at 410 (noting "impediment to effective remedies is that foreign law and foreign courts may assert priority with respect to behavior abroad, regardless of an American court's decree").

In addition to refusing to enforce U.S. judgments, nations have enacted "blocking statutes" to protest U.S. transnational assertions of jurisdiction. *See* Joelson, *supra*, at 58. These statutes have taken several forms. For instance, "the Provinces of Ontario and Quebec have long had statutes prohibiting the removal of documents of Ontario and Quebec corporations pursuant to a foreign court order." I Fugate, *supra*, § 3.11, at 279. The United Kingdom, France, and Australia have similar laws. *See id.* at 279-80. Canadian officials have explained their objection to the United States' expansion of its antitrust jurisdiction: "For one government to seek to resolve [a policy] conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right." J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195, 213 n.46 (1978).

Some countries have gone even further to "block" the extraterritorial reach of U.S. antitrust laws. In response to the treble damages allowed in private Sherman Act suits, for example, the United Kingdom enacted "a prohibition on the enforcement by United Kingdom courts of foreign judgments involving the award of multiple damages and of certain other judgments touching upon the control of restrictive practices." A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257, 257 (1981). That statute also provides a right of "claw-back" – *i.e.*, "a right for British citizens or businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element from the original plaintiff by an action in a United Kingdom court." *Id.* Canada has enacted similar legislation. *See* I Fugate, *supra*, § 3.17, at 309 (discussing Foreign Extraterritorial Measure Act in Canada and noting that such statutes demonstrate "that foreign countries, including those with very close commercial ties to the United States, are determined that U.S. anti-

trust decrees shall not be enforced within their borders, at least without their governments' assent").[5]

We highlight these various features of law from other nations to emphasize the high stakes of this case. If the court of appeals' unprecedented expansion of U.S. antitrust jurisdiction stands, more nations are likely to enact similar statutes in response to concerns about their nationals being subjected ever more frequently to the threat of treble damages and the burdens of U.S. court litigation. As a result, and although the court of appeals viewed its decision as necessary to further the interests of deterring international cartels, *see* Pet. App. 31a-33a, that judgment is likely to have just the opposite effect by jeopardizing international cooperation in the battle against cartels.

B. The Decision Below Impinges On Governmental Leniency Policies

The court of appeals' decision already threatens to undermine the corporate leniency program of the Department of Justice ("DOJ") as described by petitioners and the Solicitor General. *See* Pet. 8; Pet. App. 78a. It also could have detrimental consequences for similar programs in Germany, the EU, and other parts of the world. First, the investigation, prosecution, and deterrence of illegal international cartels through the DOJ's leniency policy is far less offensive to principles of international law and for-

[5] In the trade area, EU institutions are drafting a regulation against the Anti-Dumping Act of 1916, 15 U.S.C. § 72, which prohibits the selling at below cost of products with the intent of destroying or injuring a United States industry. Application of that law can have significant extraterritorial effects. *See, e.g., Goss Graphic Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001). For that reason, the EU has taken strong exception and announced that it will pass a regulation seeking retaliatory and protective measures against the United States for failing to repeal the 1916 law that has been held to violate international trade law by the WTO. *See* EU Press Release, *EU seeks retaliatory and protective measures in US 1916 Anti-Dumping Act dispute, available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1274|0|RAPID&lg=EN&display=.

eign sovereignty than are private antitrust suits in U.S. courts. As the International Competition Policy Advisory Committee ("ICPAC") reported in 2000 to the Attorney General and Assistant Attorney General for Antitrust, international enforcement through these policies "has occurred without offending the sovereign interests of other jurisdictions to the same degree that can arise in the context of extraterritorial enforcement. Some of the persistent concerns associated with international enforcement are sidestepped when a firm or an individual cooperates pursuant to a leniency policy, including issues of personal jurisdiction, service of process, and access to foreign-located evidence and individuals." ICPAC, *Final Report* 184-85 (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm.

Second, as it concerns the EU's Corporate Leniency Program, the European Commission ("EC") has noted that "certain undertakings involved in . . . illegal agreements are willing to put an end to their participation and inform [the Commission] of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed." Official Journal of the European Communities, *Commission notice on immunity from fines and reduction of fines in cartel cases* ¶ 3 (2002/C 45/03). Because the "Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it," and similarly was of the view "that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value," it determined to "grant an undertaking immunity from any fine which would otherwise have been imposed" if certain conditions were met. *Id.* ¶¶ 4-8.

Germany, likewise, considers its leniency policies to be an important part of its enforcement efforts, and it already has enjoyed success with its program. In June 2003, the Federal Cartel Office reported to the German Parliament on its activities in 2001 and 2002 in the battle against cartels. That report noted that the leniency rule announced

in April 2000 has "showed significant [positive] effect in the prosecution of cartels." Federal Cartel Office, *Biennial Activity Report 2001/2002* (June 27, 2003), *available at* http://dip.bundestag.de/btd/15/012/1501226.pdf (German version only) ("June 2003 Federal Cartel Report").

The leniency policy seeks to balance the interests of disclosure, deterrence, and punishment. By contrast, the interests in disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to participating in an international conspiracy. These disincentives become overwhelming when treble damages are made available not only to U.S. consumers, but also to all consumers around the world. At that point, the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program. As Mr. Lambsdorff observed, although this program had been "expressly welcomed by the US antitrust authorities[,] [n]ow the Empagran decision jeopardizes the success of the corporate leniency program in Europe since the incentive to disclose information to the authorities voluntarily will be reduced if companies must fear private class actions in the United States brought by plaintiffs from all over the world." Bonn Lecture, *supra*, at 4.

III. BECAUSE OTHER COUNTRIES FOLLOW THE EFFECTS DOCTRINE AND VIGOROUSLY APPLY THEIR COMPETITION LAWS, THERE IS NO NEED FOR U.S. ANTITRUST LAWS TO APPLY EXTRATERRITORIALLY TO PLAINTIFFS INJURED ONLY IN FOREIGN COMMERCE

A. Other Countries Vigorously Enforce Against Antitrust Abuses

The court of appeals justified its decision on the ground that "[d]isallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce." Pet. App. 32a. We respectfully submit that

the court is gravely mistaken. Not only will the court's decision likely produce *less* effective deterrence of global conspiracies by hindering international cooperation, *see* Part II, *supra*, but it also fails properly to recognize that other nations already have in place effective competition regulations and laws that adequately prohibit and deter global conspiracies affecting those nations' own commerce.

Those other nations share common ground with the United States in applying the effects doctrine, which has been accepted in "most of the world." Eleanor M. Fox, *International Antitrust and the DOHA Dome*, 43 Va. J. Int'l L. 911, 916 (2003). *See also Restatement (Third)* § 403 reporter's note, at 250 (observing that "[m]ost other states of Western Europe . . . have accepted the effects doctrine as applied to economic effects, either in their legislation or in political decisions"). Germany's competition law, for example, provides that it "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Indeed, "Germany appears to have been foremost among the member states of the [European Commission] to embrace extraterritoriality." Dorsey D. Ellis, *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 Wash. U. Global Stud. L. Rev. 477, 501 (2002). The EU, too, has adopted the effects doctrine, as "both the Commission and the Court of Justice of the European Community have applied Community law to enterprises not engaged in business in the Community, on the basis of the effect of restrictive practices within the Community." *Restatement (Third)* § 415 reporter's note, at 294. *See also Gencor Ltd. v. Commission* (Case T-102/96, 25.3.1999, E.C.R. 1999, Page II-00753) (EC's regulation of competition "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community").

B. Adherence To The Effects Doctrine By Other Countries Produces Sound International Antitrust Enforcement

The near-universal acceptance of an effects test means that rarely, if ever, will a global conspiracy go unregulated and unpunished under other countries' competition laws. Similarly, the existence of such laws reflects the seriousness with which other nations take their responsibility to police activities that form the basis for an alleged worldwide conspiracy. This fact has been recognized on both sides of the Atlantic. The DOJ has attributed the increase in the number of international cartel cases to the efforts of the Antitrust Division and "other antitrust agencies in recent years." Delrahim, *supra*, at 9 (citation omitted).

Many of those cases are investigated by utilizing "positive comity" agreements, pursuant to which "the affected authority may request that the other initiate enforcement activities." Griffin, *supra*, 67 Antitrust L.J. at 183. Because it relies on diplomacy and not unilateral expansion of one nation's laws, "[p]ositive comity is intended to eliminate the long-running dispute concerning the propriety under international law of assertions of extraterritorial jurisdiction." *Id.* The United States and the EU have had a formal positive comity agreement in place since 1991, and in 1998 the two parties built upon that agreement with the Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, *reprinted at* 37 I.L.M. 1070 (1998). The Agreement states that among its purposes is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory." *Id.* at 1071. In the years since the 1991 Agreement was signed,

"[e]nforcement officials on both sides of the Atlantic have confirmed that the flow of information between them has increased significantly." Griffin, *supra*, 67 Antitrust L.J. at 181 (noting, for example, that in 1997 alone "the U.S. antitrust agencies sent thirty-six notifications to Brussels and received forty-two from the Commission").

The efficacy of those joint governmental efforts is evident in the investigation and punishment of the very vitamin cartel involved in this case. As petitioners note, substantial penalties already have been assessed against the vitamin companies by countries outside of the United States, and there are pending private civil suits and class actions in a number of other countries. *See* Pet. 5. In Germany, suits are pending against petitioners Hoffmann-LaRoche and BASF based on the vitamin cartel at issue in this case. Such efforts are only part of a larger trend. Today, more than 100 countries have competition laws, marking a significant increase in the regulation of global antitrust issues. *See* H. Stephen Harris, *Competition Laws Outside the United States*, 2001 A.B.A. Sec. Antitrust L. 13. Germany's Federal Cartel Office alone investigated some 164 cartel or price-fixing cases in 2001 and 204 cases in 2002 – and those figures do not even include the numerous investigations the States of the German Federation conducted in those years. *See* June 2003 Federal Cartel Report at 274; *see also* II Fugate, *supra*, § 16.9, at 566 (commenting that "[t]he German Cartel Authority, with a large staff, vigorously enforces the statute"). Moreover, in 1999, the European Commission carried out investigations in 226 cases arising either from customer or competitor complaints, or from investigations raised on its own initiative. *See* European Comm'n, *Competition Policy in Europe and the Citizen* 13 (2000), *available at* http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/en.pdf.

Those efforts have produced a significant level of deterrence of competition law abuses. Subjecting companies to treble damages actions is unnecessary to achieve the nec-

essary deterrence and will, in fact, be counterproductive to ongoing enforcement efforts. *See* Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53, 54 (Sum. 2001) ("in view of the spectacular growth of antitrust in Europe and elsewhere, international cartels are sufficiently deterred without the need to extend U.S. treble damage protection to all victims around the world"). The court of appeals, however, adopted the mistaken view that international cartels can be sufficiently deterred only through expansion of U.S. extraterritorial jurisdiction to foreign plaintiffs who were affected only in foreign commerce. That erroneous judgment should be corrected by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 2003

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IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 2003
PETITION FOR CERTIORARI GRANTED DECEMBER 15, 2003

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries.....	1
Notice of Designation of Related Civil Cases Pending In This Or In Any Other United States Court, dated July 17, 2000.....	3
Plaintiffs' Amended Class Action Complaint, dated November 14, 2000	6
Order of the United States District Court for the District of Columbia, dated June 7, 2001	69

TABLE OF CONTENTS—Continued

Page

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for Certiorari:

Memorandum Opinion of the United States District Court for the District of Columbia, dated June 7, 2001 ..... 45a

Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated January 17, 2003 ..... 1a

Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing, dated September 11, 2003 ..... 43a

Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing En Banc, dated September 11, 2003 ..... 44a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
July 14, 2000	Complaint of Plaintiffs Empagran, S.A., et al., filed in the United States District Court for the District of Columbia.
July 14, 2000	Notice of Designation of Related Civil Cases Pending In This Or In Any Other United States Court filed in the United States District Court for the District of Columbia.
Nov. 14, 2000	Amended Complaint filed in the United States District Court for the District of Columbia.
June 7, 2001	Order and Memorandum Opinion of the United States District Court for the District of Columbia filed granting Joint Motion to Dismiss Amended Complaint and further ordering, among other things, that domestic plaintiffs either supplement their federal antitrust allegations or file written stipulations of dismissal.
July 5, 2001	Plaintiffs' Notice of Interlocutory Appeal filed in the United States District Court for the District of Columbia.
July 25, 2001	Plaintiffs' Notice of Appeal filed in the United States Court of Appeals for the District of Columbia Circuit.
Sept. 10, 2001	Order of the United States District Court for the District of Columbia filed granting Motion for an Order Directing Entry of Final Judgment.

DATE	PROCEEDINGS
April 26, 2002	Final Judgment of the United States District Court for the District of Columbia filed granting Motion to Dismiss.
Jan. 17, 2003	Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit filed.
Feb. 19, 2003	Petition for Rehearing and Petition for Rehearing En Banc filed in the United States Court of Appeals for the District of Columbia Circuit
March 7, 2003	Order of the United States Court of Appeals for the District of Columbia Circuit filed inviting Solicitor General to file a Response to the Petition for Rehearing En Banc.
March 24, 2003	Brief for the United States and the Federal Trade Commission as *Amici Curiae* in Support of Petition for Rehearing En Banc filed in the United States Court of Appeals for the District of Columbia Circuit.
Sept. 11, 2003	Order of the United States Court of Appeals for the District of Columbia Circuit filed Denying Petition for Rehearing.
Sept. 11, 2003	Order of the United States Court of Appeals for the District of Columbia Circuit filed Denying Petition for Rehearing En Banc.
Oct. 24, 2003	Order of the United States Court of Appeals for the District of Columbia Circuit filed Denying Motion to Stay Mandate.

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FOR THE DISTRICT OF COLUMBIA

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING IN THIS OR IN ANY OTHER UNITED STATES COURT

Civil Action No. 00 1686
(To be supplied by the Clerk)

NOTICE TO PLAINTIFF:

Pursuant to Rule 405(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk's records, one copy for the Judge to whom the case is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 405(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL:

Rule 405(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff or counsel for plaintiff will please complete the following:

1. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

   A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(es) below.]

   [ ] (a) relates to common property

   [X] (b) involves common issues of fact

   [X] (c) grows out of the same event or transaction

   [ ] (d) involves the validity or infringement of the same patent

   [ ] (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(S).

   A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and relates to the same subject matter.

   Check box if new case is related to a dismissed case: [ ]

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT): *District of Columbia*

4. CAPTION AND CASE NUMBER OF RELATED CASE(S). IF MORE ROOM IS NEEDED PLEASE USE OTHER SIDE.

In re Bulk Vitamins Antitrust Litigation 99MS197, MDL NO. 99MS1285

7/14/00 /s/
DATE Signature of Plaintiff (or Counsel)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMENDED CLASS ACTION COMPLAINT
Case No. 1:00 CV01686 (TFH)
JURY TRIAL DEMANDED

EMPAGRAN, S.A.
KN 19 Via a La Costa Guayaquil
Province of Guayas
Republic of Ecuador,

NUTRICION ANIMAL, S.A.
El Hato Del Volcan
Primavera Street
Chiriqui, Panama,

WINDDRIDGE PIG FARM
Moppity Road
Yonge, NSW, Australia,

BRISBANE EXPORT
CORPORATION PTY, LTD.
50 Antimony Street
Caroll Park, Goodna, Australia,

PROCTER & GAMBLE MANUFACTURA,
S de R.L de C.V.
Loma Florida #32
Col. Lomas de Vistahermosa, Deleg.
Cuajimalpu, Mexico,

PROCTER & GAMBLE EUROPEAN SUPPLY COMPANY BVBA
1853 Strombeek-Bever
Temselaan, 100 Belgium,

PROCTER & GAMBLE, LTD.
Hedley House
St. Nicholas Avenue, Gosforth
Newcastle upon Tyne, NE99 1 EE
United Kingdom,

PROCTER & GAMBLE MANUFACTURING COMPANY
One Procter & Gamble Plaza
Cincinnati, OH 45202,

PROCTER & GAMBLE TECHNICAL CENTERS, LTD.
The Heights
Brooklands, Weybridge
Surrey, United Kingdom,

P.T. PROCTER & GAMBLE HOME PRODUCTS INDONESIA AND
P.T. PROCTER & GAMBLE INDONESIA,
Menara Rajawaii, 15th Floor
J.I. Mega Kunigan Lot #5.1
Kawasan Mega Kunigan, Jakarta 12950,

THE PROCTER & GAMBLE COMPANY
One Proctor & Gamble Plaza
Cincinnati, OH 45202,

and

CONCERN STIROL
10, Gorlovskaya Diviza Street
338010 Gorlovka
Donetsk Region, Ukraine,

On behalf of themselves and all others similarly situated,
Plaintiffs,

F. HOFFMAN LAROCHE, LTD.,
Box CH-4070
Basel, Switzerland,

HOFFMAN-LAROCHE, INC.,
1300 I Street, N.W. No. 520
Washington, D.C. 20005,

ROCHE VITAMINS, INC.
45 Waterview Boulevard
Parsippany, NJ 07054,

BASF A.G.
Carl-Bosch-Straße 39
67056 Ludwigshafen, Germany,

BASF CORPORATION
3000 Continental Drive North
Mount Olive, NJ 07828,

RHONE-POULENC ANIMAL NUTRITION, INC.
500 Northridge Road
Atlanta, Georgia 30350,

RHONE-POULENC S.A.
25 quai Paul Doumer
92408 Courbevoir Cedex, France,

RHONE-POULENC INC.
1401 I Street, NW
Suite 200
Washington, DC 20005,

AVENTIS, S.A.
Espace Européen de l'Europe
F-67300
Schiltigheim, France,

HOECHST MARION ROUSSEL, S.A.
102, route de Noisy
93235 Romainville CEDEX
France,

AKZO NOBEL, INC.
300 S. Riverside Plaza
Chicago, IL 60606,

AKZO Nobel Chemicals bv
Stationsplein 4
3818 LE Amersfoort
Postbus 247
3800 AE Amersfoort
The Netherlands,

LONZA, A.G.,
Munchensteinerstrasse 38
P.O. Box CH 4002
Basel, Switzerland,

LONZA, Inc.
17-17 Route 208
Fairlawn, New Jersey 07410,

Alusuisse Lonza Group Ltd.
Feldeggstr.
P.O. Box CH-8034
Zurich, Switerland,

Cope Investments, Ltd.
25 King Street, West
Suite 275
Toronto, Canada M5L 1E5,

Chinook Group, Ltd.,
224 Holt Line West
P.O. Box 160
Sombra, Ontario Canada N0P 2HO,

Chinook Group, Inc.
41420 Forest Blvd.
North Branch, MN 55056,

DCV, Inc.,
3521 Silverside Road
Wilmington, DE 19810-4900,

DuCoa, L.P.,
115 Executive Drive
Highland, IL 62249,

Eisai Co., Ltd.,
4-6 10 Koishikawa, Bunkyo-ku
Tokyo 112-88, Japan,

Eisai U.S.A., Inc.,
Marathon Oil Tower, Suite 690
5555 San Felipe Road
Houston, TX 77056,

Eisai, Inc.
Glenpointe Centre West, 5th Floor
500 Frank W. Burr Blvd.
Teaneck, NJ 07666-6741,

Daiichi Pharmaceutical Co., Ltd.,
14-10 Nihonbashi 3-Chome Chuonku
Tokyo, Japan 103-8324,

Daiichi Fine Chemicals, Inc.
One Overlook Point, Suite 250
Lincolnshire, IL 60069,

Daiichi Pharmaceuticals Corporation
11 Phillips Parkway
Montvale, NJ 07645,

Takeda Chemical Industries, Ltd.,
1-1, Doshomachi 4-chome,
Chuo-ku, Osaka 541-8645 Japan,

Takeda Vitamin & Food, USA, Inc.,
101 Takeda Drive
Wilmington, NC 28401

Takeda U.S.A., Inc.
8 Corporate Drive
Orangeburg, NY 10962-2614,

Sumitomo Chemical Co., Ltd.
Sumitomo Building
5-33 Kitahama 4-Chome
Chuo-Ku, Osaka, Japan 541-8550,

Sumitomo Chemical America, Inc.
345 Park Avenue
New York, NY 10154

Tanabe Seiyaku Company, Ltd.
2-10 Dosho-Machi 3-Chome
Chuo-Ku, Osaka, Japan,

Tanabe U.S.A. Inc.
7340 Convoy Court
San Diego, CA 92111,

Merck KgaA,
Frankfurter Straße 250
64293 Darmstadt, Germany,

E. Merck
Frankfurter Straße 250
64293 Darmstadt, Germany,

EM Industries, Inc.
7 Skyline Drive
Hawthorne, NY 10532,

Degussa-Hüls AG,
Weissfrauenstrasse 9
60287 Frankfurt, Germany,

Degussa Hüls Corporation
65 Challenger Rd.
Ridgefield Park, NJ 07660,

Nepera, Inc.
Route 17
Harriman, NY 10925,

Reilly Chemicals, S.A.
154 Chausseé de la Hulpe
1170 Brussels, Belgium,

Reilly Industries, Inc.
300 N. Meridan Street, Suite 1500
Indianapolis, IN 46204,

UCB SA
Avenue Louise 326
1050 Brussels, Belgium,

UCB Chemicals Inc.
2000 Lake Park Drive SE
Smyrna, GA 30080,

Mitsui & Co. Ltd.
2-1 Ohetemachi 1 chrome
Chujola-ku
Tokyo, Japan,

Mitsui & Co. U.S.A. Inc.
200 Park Avenue
New York, NY 10166,

and

Bioproducts, Inc.
320 Springside Drive
Fairlawn, OH 44333.

Defendants.

AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF UNITED STATES, FOREIGN AND INTERNATIONAL ANTITRUST LAWS

Plaintiffs, by and through their undersigned attorneys, bring this action on behalf of themselves and all others similarly situated for damages and injunctive relief under the antitrust laws of the United States, the antitrust laws of relevant foreign nations, and international law, against the above-named defendants, demanding a trial by jury. For their Class Action Complaint against defendants, Plaintiffs allege the following:

NATURE OF THIS ACTION

1. This case arises out of a massive and long-running conspiracy, beginning as early as January 1988 and continuing until at least February 1999, among all defendants and their co-conspirators with the purpose and effect of fixing prices, allocating market share, and committing other unlawful practices designed to inflate the prices of various vitamins, identified more specifically below ("Class Vitamins"), sold to the Plaintiffs and other purchasers both within and outside the United States.

2. The conspiracy involved an astonishing array of illegal conduct by an international cartel that has deliberately targeted, and severely burdened, consumers both in the United States and foreign nations. The conspiracy has existed at least during the period from January 1, 1988 through February 1999 (the "Class Period"), and has affected billions of dollars of commerce worldwide. The conspiracy has included communications and meetings in which defendants agreed expressly and repeatedly to eliminate competition, injure and destroy businesses that would have reduced defendants' illegal market control, and to fix the prices and allocate markets worldwide for various vitamins and vitamin premixes.

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among defendants and their co-conspirators, the substantial terms of which were:

(a) to fix and maintain prices and to coordinate price increases for the sale of various vitamins throughout the United States and foreign countries;

(b) to allocate among defendants and their co-conspirators volumes of sales of various vitamins throughout the United States and foreign nations;

(c) to allocate among defendants and their co-conspirators all or part of certain contracts to supply various vitamins to various customers located throughout the United States and foreign nations;

(d) to refrain from submitting bids, or to submit collusive, non-competitive, and rigged bids to supply various vitamins to various customers located throughout the United States and foreign nations; and

(e) to supply various vitamins to various customers located throughout the United States and foreign nations at non-competitive prices and receive compensation therefrom.

4. The acts in furtherance of the conspiracy by defendants have included the following wrongful conduct and horizontal agreements:

(a) representatives of defendants participating in meetings and conversations in the United States and foreign nations, in which defendants and their co-conspirators discussed and agreed concerning the prices, volume of sales, and markets for vitamins and vitamin premixes;

(b) agreeing, during those meetings and conversations, to charge prices at specified levels and otherwise increase and maintain prices of various vitamins sold throughout the United States and foreign nations;

(c) agreeing, during those meeting and conversations, to allocate among the defendants and their corporate co-conspirators the approximate volume of various vitamins to be sold by each corporate conspirator throughout the United States and foreign nations;

(d) agreeing, during those meetings and conversations, to allocate among defendants and their co-conspirators customers of various vitamins throughout the United States and foreign nations;

(e) agreeing, during those meetings and conversations, to restrict producing capacity of various vitamins among defendants and co-conspirators;

(f) exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreement;

(g) issuing price announcements and price quotations in accordance with the agreements reached;

(h) discussing among co-conspirators the submission of prospective bids to supply various vitamins to customers located throughout the United States and foreign nations;

(i) determining and designating which defendant would be the designated low bidder for contracts to supply various vitamins to customers located throughout the United States and foreign nations;

(j) discussing and agreeing upon prices to be contained within the bids for contracts to supply various vitamins to customers throughout the United States and foreign nations;

(k) refraining from bidding or submitting intentionally high, complementary bids for contracts to supply various vitamins to customers throughout the United States and foreign nations; and

(l) supplying various vitamins to various customers throughout the United States and foreign nations at non-competitive prices and receiving compensation therefrom.

5. Whenever in this Amended Complaint reference is made to any act, deed or transaction of any corporation or organization, the allegation means that the corporation or organization engaged in the act, deed or transaction by or through its officers, directors, agents, employees, servants or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

6. "Class Vitamins" include Vitamins A, C, E, B1, B2, B3, B5, B6, B9, B12, H, beta carotene, astaxanthin, canthaxanthin and vitamin premixes.

JURISDICTION AND VENUE

7. Plaintiffs bring this action under Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26; the antitrust laws of relevant foreign nations; and international law, to obtain injunctive relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against defendants for the injuries sustained by plaintiffs by reason of defendants' and their co-conspirators' violations of the Sherman Act, the antitrust laws of relevant foreign nations, and international law.

8. This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1337 and 15 U.S.C. §§ 1, 15, 22 and 26; 28 U.S.C. § 1350 ("Alien Tort Claims Act"); and 28 U.S.C. § 1367.

9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), (d) and 15 U.S.C. §§ 15, 22 and 26.

10. Jurisdiction over all defendants comports with the United States Constitution, 15 U.S.C. §§ 15, 22 and 26, and the District of Columbia long-arm statute.

11. Each defendant has transacted business in the United States, done an act in the United States, or caused an anticompetitive effect in the United States by an act done elsewhere.

PARTIES

Plaintiffs

12. Plaintiff Empagran, S.A. ("Empagran"), is a foreign corporation domiciled at KN 19 Via a La Cost, Guayaquil, province of Guayas, of the Republic of Ecuador. Empagran purchased certain Class Vitamins directly from certain defendants or their co-conspirators for several years during the Class Period, including 1997, 1998 and 1999.

13. Plaintiff Nutricion Animal, S.A. ("Nutricion"), is a foreign corporation domiciled at El Hato Del Volcan, Primavera Street, Chiriqui, Panama. Nutricion purchased certain Class Vitamins directly from certain defendants or their co-conspirators for several years during the Class Period, including 1998.

14. Plaintiff Windridge Pig Farm ("Windridge") is an Australian entity located on Moppity Road, Yonge, NSW, Australia. During the Class Period, Windridge purchased vitamin premix directly from the certain defendants or their co-conspirators.

15. Plaintiff Brisbane Export Corporation Ply, Ltd. ("Brisbane") is an Australian corporation located at 50 Antimony Street, Caroll Park, Goodna, Australia. During the Class Period, Brisbane purchased vitamins A, D and E from the certain defendants or their co-conspirators.

16. Plaintiff Procter & Gamble Manufactura, S. de R.L. de C.V. (formerly known as Richardson-Vicks, S.A., de C.V. and Procter & Gamble de Mexico, S. de R.L. de C.V.) ("P&G Manufactura") is a foreign corporation domiciled at Loma Florida #32, Col. Lomas de Vistahermosa, Deleg. Cuajimalpu in Mexico. P&G Manufactura purchased certain Class Vitamins including vitamin C directly from certain defendants or their co-conspirators for several years during the Class Period, including 1988-91.

17. Plaintiff Procter & Gamble European Supply Company BVBA ("P&G European Supply") is a foreign corporation domiciled at 1853 Strombeek-Bever, Temselaan, 100 in Belgium. P&G European Supply purchased certain Class Vitamins directly from certain defendants or their co-conspirators for several years during the Class Period.

18. Plaintiff Procter & Gamble, Ltd. ("P&G Ltd.") is a foreign corporation domiciled at Hedley House, St. Nicholas Avenue, Gosforth, Newcastle upon Tyne, NE 99 1 EE in the United Kingdom. P&G Ltd. purchased Vitamins B, C and E from certain defendants or their co-conspirators for several years during the Class Period, including 1997-98.

19. Plaintiff The Procter & Gamble Manufacturing Company ("P&G Manufacturing") is an Ohio corporation with its principal place of business at One Procter & Gamble Plaza, Cincinnati, Ohio 45202. P&G Manufacturing purchased vitamin B5, and precursors and intermediates thereto, from certain defendants or their co-conspirators for use in foreign countries during the Class Period, including 1994-97.

20. Procter & Gamble Technical Centers, Ltd. ("P&G Technical Centers") is a foreign corporation domiciled at The Heights, Brooklands, Weybridge, Surrey in the United Kingdom. P&G Technical Centers purchased vitamin B5,

and precursors and intermediates thereto, from certain defendants or their co-conspirators during the Class Period, including 1997.

21. Plaintiffs P.T. Procter & Gamble Home Products Indonesia and P.T. Procter & Gamble Indonesia (collectively, "P&G Indonesia") are foreign corporations domiciled at Menara Rajawaii, 15th Floor, J.I. Mega Kunigan Lot #5.1, Kawasan Mega Kunigan, Jakarta 12950 in Indonesia. P&G Indonesia purchased vitamins B5 and C, including precursors and intermediates thereto, from certain defendants or their co-conspirators during the Class Period, including 1993-1999.

22. Plaintiff The Procter and Gamble Company ("P&G") is an Ohio corporation with its principal place of business at One Procter and Gamble Plaza, Cincinnati, Ohio 45202. P&G suffered injury in the United States during the Class Period as a result of Defendants' anticompetitive conduct outside the United States.

23. Plaintiff Concern Stirol ("Stirol") is a Ukrainian company with its principal place of business at 10, Gorlovskaya Diviza Street, 338010 Gorlovka, Donetsk Region, Ukraine. During the Class Period, Stirol purchased bulk vitamins, including vitamin C, and vitamin premixes from certain defendants or their co-conspirators.

Defendants

24. Defendant F. Hoffman LaRoche, Ltd. ("Roche Ltd.") is a Swiss corporation with operations in the United States. Roche Ltd. is a subsidiary of Roche Holding Ltd., a Swiss pharmaceutical company based in Basel, Switzerland. Roche, Ltd., through its affiliates, is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins in the United States and throughout the world. Roche, Ltd., directly and through affiliates that it

controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

25. Defendant Hoffman-LaRoche, Inc. ("Roche Inc.") is a New Jersey corporation with operations in the United States, and its principal place of business in Nutley, New Jersey. It conducts regular business in this District and maintains offices at 1300 I Street, N.W., No. 520, Washington, D.C. 20005. It is an affiliate of Roche Ltd. Roche Inc. is wholly-controlled by Roche Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States. It was engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins, in the United States and throughout the world until at least 1997.

26. Roche Vitamins, Inc. ("Roche Vitamins") is a Delaware corporation with its principal place of business in New Jersey. Roche Vitamins is wholly-controlled and dominated by Roche Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States. Roche Vitamins is directly engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins (A, C, E, B1, B2, B5, B6, B9, H, beta carotene, astaxanthin, canthaxanthin) throughout the United States and elsewhere.

27. Defendant BASF A.G. is a German corporation with operations in the United States. BASF A.G., through its affiliates, is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins, throughout the world. BASF A.G., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and these horizontal practices were designed to and have had a substantial and adverse impact within the United States. BASF A.G., through its affiliates, is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins in the United States, and throughout the world. BASF A.G., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

28. Defendant BASF Corporation is a Delaware corporation with operations in the United States and its principal place of business in Mount Olive, New Jersey. BASF Corporation is registered to do business in the District of Columbia. Its registered agent for service of process is located at CT Corporation, 1025 Vermont Avenue, N.W., Washington, D.C. 20005. It is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamins, including one or more of the Class Vitamins, in the United States and throughout the world. It is a wholly owned affiliate of BASF A.G. BASF Corporation is wholly-controlled by BASF A.G., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

29. Defendant Rhone-Poulenc S.A. ("RP S.A.") is a French corporation with operations in the United States. RP S.A., through its affiliates, is engaged in the business of the

distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins in the United States and throughout the world. RP S.A., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

30. Defendant Rhone-Poulenc Animal Nutrition, Inc. ("RP Animal Nutrition") is a Delaware corporation with its principal place of business in Atlanta, Georgia. It is wholly controlled by RP S.A., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States. RP Animal Nutrition is a successor to Rhone-Poulenc, Inc. ("RP Inc."), a New York corporation, with operations in the United States. Since at least 1998, RP Animal Nutrition has been directly engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products including one or more of the Class Vitamins throughout the United States and elsewhere.

31. Defendant Rhone-Poulenc Inc. ("RP Inc.") is a New York Corporation with its principal place of business in New Jersey. RP Inc. has conducted regular business in this District and is registered to do business at 1401 I Street, N.W., No. 200, Washington, D.C. 20005. RP Inc. was engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products including one or more of the Class Vitamins throughout the United States and elsewhere until at least 1998. RP Inc. is wholly-controlled and dominated by RP S.A., both with respect to the conduct of its business in the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

32. Defendant Hoechst Marion Roussel, S.A. ("Hoechst") is a French corporation with its principal place of business in Romainville, France. Defendant Hoechst is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including B12, in Europe and elsewhere. Hoechst, directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

33. Defendant Aventis, S.A. ("Aventis") was created by the December 1999 merger between Hoechst, A.G. and Rhone-Poulenc, S.A. Defendant Aventis is a French corporation with its principal place of business in Schiltigheim, France. Upon information and belief, Aventis is the successor-in-interest to Hoechst and Rhone-Poulenc.

34. Defendant AKZO Nobel, Inc. ("AKZO Inc.") is a Delaware corporation with its principal place of business at 300 S. Riverside Plaza, Chicago, Illinois 60606. AKZO Inc. is engaged in the business of the manufacturing, distribution and sales of one or more of the Class Vitamins [sic]? in Europe and elsewhere.

35. Defendant AKZO Nobel Chemicals, bv ("AKZO bv") is a Netherlands corporation with its principal place of business in the Netherlands. Defendant AKZO bv is in the business of manufacturing, distribution and sales of one or more of the Class Vitamins, including choline chloride, in Europe and elsewhere. AKZO by directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

36. Defendant LONZA A.G. ("LONZA A.G.") is a Swiss corporation with its principal place of business in Basel, Switzerland. Lonza A.G., through its affiliates, is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States. Lonza A.G., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

37. Defendant LONZA, Inc. ("LONZA") is a New York corporation with its principal place of business in Fair Lawn, New Jersey. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins including B3 and H throughout the United States and elsewhere. Lonza is wholly-owned and dominated by Lonza A.G. and AL Group, generally and with respect to its challenged horizontal conduct.

38. Defendant Alusuisse Lonza Group Ltd. ("AL Group") is a Swiss corporation with operations in the United States. AL Group, through its affiliates, is engaged in the business of the distribution and sale of one or more of the Class Vitamins, throughout the world and elsewhere. AL Group, directly and through affiliates that it dominates and controls, and through actions in this country and outside the United States, has set prices and allocated markets for vitamins, pursuant to illegal horizontal agreements, and these horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

39. Defendant Cope Investments Ltd. ("Cope") is the entity holding all of the shares of stock of defendant Chinook Group, Ltd. and is wholly owned by Peter Copeland and Patrick Stayner, who also served as Cope's principal agents.

Cope benefited and was intended to benefit from the illegal and oppressive activities described herein through its wholly owned subsidiaries and entities and Copeland and Stayner as its principals and agents.

40. Defendant Chinook Group, Ltd. is a Canadian limited partnership headquartered in Sombra, Canada and organized and existing under the law of Ontario, Canada. Chinook Group, Ltd., through its affiliates, is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins, throughout the United States and the world. Chinook Group, Ltd., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

41. Defendant Chinook Group, Inc. is a Minnesota corporation whose principal place of business is North Branch, Minnesota. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States.

42. Defendant DCV, Inc. is a Delaware corporation whose principal place of business is Wilmington, Delaware. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States. DCV, Inc., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

43. Defendant DuCoa L.P., a wholly-owned subsidiary of defendant DCV, Inc., has its principal place of business in

Highland, Illinois. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States. DuCoa, L.P., through its affiliates, is engaged in the business of the distribution and sale of vitamins, vitamin premixes and bulk vitamin products, including one or more of the Class Vitamins in the United States and throughout the world.

44. Defendant Eisai Co., Ltd. ("Eisai Ltd.") is a Japanese limited partnership having its principal place of business in Tokyo, Japan. It is engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Eisai Ltd., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

45. Defendant Eisai U.S.A., Inc. ("Eisai U.S.A.") is a Texas corporation having its principal location of business in Houston, Texas. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States.

46. Defendant Eisai Inc. is a Delaware corporation with operations in the United States and its principal place of business in Teaneck, New Jersey. Eisai Inc. is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin E, throughout the United States and elsewhere. Eisai Inc. is a wholly-owned affiliate of defendant Eisai Ltd., and wholly owns defendant Eisai U.S.A. Eisai Inc. is wholly-controlled and dominated by Eisai Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

47. Defendant Daiichi Pharmaceutical Co., Ltd. ("Daiichi") is a corporation organized and existing under the law of Japan, with its principal place of business in Tokyo, Japan. It is engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Daiichi, directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

48. Daiichi Fine Chemical, Inc. ("Daiichi Inc.") is a Delaware corporation with operations in the United States and its principal place of business in Lincolnshire, Illinois. Daiichi Inc. is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin B5 (calpan) and vitamin B6, throughout the United States and elsewhere. Daiichi Inc. is wholly-controlled and dominated by Daiichi Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

49. Daiichi Pharmaceuticals Corporation ("Daiichi Corp.") is a Delaware corporation with operations in the United States and its principal place of business in Montvale, New Jersey. Daiichi Corp. is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin B5 (calpan) and vitamin B6, throughout the United States and elsewhere. Daiichi Corp. is wholly-controlled and dominated by Daiichi Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

50. Defendant Takeda Chemical Industries, Ltd. ("Takeda Ltd.") is a limited partnership in Japan having its principal location of business in Osaka, Japan. Takeda Ltd., through its affiliates, is engaged in the business of the distribution and

sale of one or more of the Class Vitamins, including vitamins C, B1, B2, B6, and folic acid, throughout the world and elsewhere. Takeda Ltd., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

51. Takeda Vitamin & Food U.S.A. ("Takeda Vitamin") is a North Carolina corporation with operations in the United States and its principal place of business in Wilmington, North Carolina. Takeda Vitamin is wholly-controlled and dominated by Takeda Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States. Takeda Vitamin is a successor to defendant Takeda U.S.A., Inc. ("Takeda U.S.A."), which prior to 1998 was engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamins C, B1, B2, B6, and folic acid, throughout the world and elsewhere. During that period, Takeda U.S.A. was wholly-controlled and dominated by Takeda Ltd., both with respect to the conduct of its business in the United States generally and with respect to its challenged horizontal conduct within the United States. Since at least 1998, Takeda Vitamin has been directly engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamins C, B1, B2, B6, and folic acid, throughout the United States and elsewhere.

52. Defendant Sumitomo Chemical Co., Ltd. ("Sumitomo Ltd.") is a Japanese corporation with operations in the United States. Sumitomo Ltd., through its affiliates, is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin B9 (folic acid) and vitamin H (biotin), throughout the world and elsewhere.

Sumitomo Ltd., directly and through affiliates that it dominates and controls, and through actions in this country and outside the United States, has set prices and allocated markets for vitamins, pursuant to illegal horizontal agreements, and these horizontal practices were designed to have and did have a substantial and adverse impact within the United States.

53. Defendant Sumitomo Chemical America, Inc. ("Sumitomo Chemical") is a New York corporation with operations in the United States and its principal place of business in New York, New York. Sumitomo Chemical is a wholly-owned subsidiary of defendant Sumitomo Ltd. Sumitomo Chemical is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin B9 (folic acid) and vitamin H (biotin), throughout the United States and elsewhere. Sumitomo Chemical is wholly-controlled and dominated by Sumitomo Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

54. Defendant Tanabe Seiyaku Company, Ltd. ("Tanabe Ltd.") is a Japanese corporation with operations in the United States. Tanabe Ltd., through its affiliates, is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin H (biotin), throughout the world and elsewhere. Tanabe Ltd., directly and through affiliates that it dominates and controls, and through actions in this country and outside the United States, has set prices and allocated markets for vitamins, pursuant to illegal horizontal agreements, and these horizontal practices were designed to have and did have a substantial and adverse impact within the United States.

55. Defendant Tanabe U.S.A., Inc. ("Tanabe USA") is a Delaware corporation with operations in the United States and its principal place of business in San Diego, California.

Tanabe USA is a wholly-owned subsidiary of defendant Tanabe Ltd. Tanabe USA is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin H (biotin), throughout the United States and elsewhere. Tanabe USA is wholly-controlled and dominated by Tanabe Ltd., both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

56. Defendant Merck KgaA is a German corporation having its principal location of business in Darmstadt, Germany. It engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Merck KgaA, directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

57. Defendant E. Merck is a German corporation having its principal location of business in Darmstadt, [sic] Germany. It engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. E. Merck, directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

58. Defendant EM Industries, Inc. ("EM Industries") is a New York corporation with operations in the United States and its principal place of business in Hawthorne, New York. EM Industries is a wholly-owned subsidiary of defendant Merck KGaA. EM Industries is engaged in the business of the distribution and sale of one or more of the Class Vitamins,

including vitamin C, throughout the United States and elsewhere. EM Industries is wholly-controlled and dominated by Merck KGaA and E. Merck, both with respect to the conduct of its business within the United States generally and specifically with respect to its challenged horizontal conduct within the United States.

59. Defendant Degussa-Hüls AG is a German corporation having its principal location of business in Frankfurt, Germany. It engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Degussa-Hüls AG, directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

60. Defendant Degussa-Hüls Corporation, a wholly-owned subsidiary of defendant Degussa-Hüls AG and the successor-in-interest to Degussa Corporation, is an Alabama corporation with executive offices in Ridgefield Park, New Jersey. It is engaged in the business of the distribution and sale of one or more of the Class Vitamins throughout the United States.

61. Defendant Nepera Inc. is a New York corporation with its principal location of business in Harriman, New York. Defendant Nepera Inc. is engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Nepera Inc., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

62. Defendant Reilly Chemicals, S.A. ("Reilly Chemicals") is a corporation organized and existing under the laws of Belgium. Reilly Chemicals is engaged in the sale of one or more of the Class Vitamins, including vitamin B3, in the United States and elsewhere. Defendant Reilly Industries, directly and through affiliates that it dominates and controls and through actions in this country and outside it, has set prices and allocated markets for vitamins, pursuant to illegal horizontal agreements, and these horizontal practices were designed to have and in fact did have a substantial and adverse impact within the United States.

63. Defendant Reilly Industries, Inc. is an Indiana corporation that was one-half of a joint venture known as Vitachem. Vitachem dissolved on January 1, 1999. Reilly Industries, Inc. has its principal location of business in Indianapolis, Indiana. Reilly Industries, Inc. is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including vitamin B3, throughout the United States and elsewhere. Reilly Industries, Inc. directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

64. Defendant UCB SA ("UCB SA") is a Belgian corporation with its principal place of business in Brussels, Belgium. UCB SA is in the business of the manufacturing, distribution and sale of one or more of the Class Vitamins, including choline chloride, in Europe and elsewhere.

65. Defendant UCB Chemicals Inc. is a Delaware corporation with is principal place of business in Smyrna, Georgia. UCB Chemicals Inc. is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including choline chloride.

66. Defendant Mitsui & Co., Ltd. is a Japanese corporation with its principal place of business in Tokyo, Japan, and is engaged in the business of manufacturing, distribution, and sale of one or more of the Class Vitamins, including choline chloride, in Europe and elsewhere. Mitsui & Co., Ltd., is the parent company of Mitsui & Co., U.S.A., Inc.

67. Defendant Mitsui & Co. U.S.A., Inc. is a New York corporation, with its principal place of business in New York, New York, and is engaged in the business of the distribution and sale of one or more of the Class Vitamins, including choline chloride, in Europe and elsewhere. Mitsui & Co. U.S.A., Inc. is wholly owned by Mitsui & Co., Ltd.

68. Defendant Bioproducts, Inc., is an Ohio corporation with its principal location of business in Fairlawn, Ohio. It is engaged in the manufacture and sale of one or more of the Class Vitamins in the United States and elsewhere. Bioproducts, Inc., directly and through affiliates that it controls, and through actions in this country and internationally, has set prices and allocated markets pursuant to illegal horizontal agreements, and those horizontal practices were designed to have, and in fact did have, a substantial and adverse impact within the United States.

69. Various other persons, companies and corporations, some of the identities of which are presently unknown, and which are not named as defendants herein, have participated as co-conspirators with defendants in the violations alleged, and have performed acts and made statements in the United States and foreign nations, in furtherance thereof.

BACKGROUND FACTS

70. Vitamins are organic compounds required in the diet of humans and animals for normal growth and maintenance of life. Vitamins are essential sources of certain coenzymes

necessary for metabolism, the biochemical processes that support life. All known vitamins have been synthesized chemically, and various such synthesized vitamins are manufactured and sold by defendants and their corporate co-conspirators.

71. The manufacture of vitamins, vitamin premixes and other bulk vitamin products is a multibillion dollar-a-year industry worldwide. For example, in 1995, global sales for vitamins A, B2 and E were approximately $574 million, $139 million, and $1 billion, respectively.

72. During the Class Period, the world market for vitamins, vitamin premixes, intermediates, precursors and other bulk vitamin products, including the Class Vitamins, was dominated by three companies: Roche, Rhone-Poulenc and BASF. For example, these defendants control between 70 to 95 percent of the world vitamin market for Vitamins A, B2 and E. Roche, BASF, and Rhone-Poulenc together control over 95 percent of the worldwide markets for vitamins A and E.

73. During the Class Period, the conduct of defendants and their co-conspirators has taken place in and affected the interstate commerce of the United States, the internal commerce of foreign nations, and international trade.

74. The conduct of defendants and their co-conspirators has directly, substantially and foreseeably restrained such trade and commerce.

75. The Class Vitamins of Defendants are sold in interstate commerce in the United States. For example, Roche sells in interstate commerce vitamins such as vitamin A (acetate and palmatate), vitamin B2 (riboflavin), B5 (pantothenic acid), B9 (folic acid), vitamin C, vitamin E (D-Alpha and DL-Alpha), beta carotene, and vitamin H (biotin). BASF sells in interstate commerce vitamins such as vitamin A (acetate and palmatate), vitamin C, vitamin E (D-Alpha

and DL-Alpha), vitamin B2 (riboflavin), vitamin B9 (folic acid) and beta carotene. Rhone-Poulenc sells vitamin A (acetate and palmatate), vitamin B12 (cyanocobalamin), and vitamin E (D-Alpha and DL-Alpha). LONZA sells in interstate commerce vitamin B3 (niacin and niacinamide). DuCoa sells vitamin B4 in interstate commerce.

76. The bulk vitamin industry in the United States and foreign nations is characterized by economic conditions that are consistent with the conspiracy alleged herein. The Class Vitamins are considered to be commodities; there is a relatively small number of producers of these vitamins; and there are high barriers of entry due to the costly and sophisticated nature of vitamin manufacturing.

CRIMINAL PLEAS/INFORMATIONS

77. On May 20, 1999, F. Hoffmann-La Roche Ltd. ("Roche Ltd.") entered a Plea Agreement in the United States District Court for the Northern District of Texas with respect to which Roche Ltd. was required to pay a fine of $500,000,000 and admitted:

> (a) During the period of January, 1990 through at least February, 1999, (the "relevant period"), Roche Ltd., through several of its executives, officers, and employees, participated in a conspiracy with other vitamin manufacturers, the primary purpose of which was to fix, increase, and maintain the price and allocate the volume of, certain vitamins sold in the United States and elsewhere, and to allocate the volume of, certain vitamins sold in the United States. In furtherance of the conspiracy, Roche Ltd., through a number of its executives, officers and employees, engaged in conversations and attended meetings with representatives of other vitamin manufacturers. During such meetings and conversations, agreements were reached as to the prices at which the conspirators would sell certain

vitamins and the timing of price increases, and the volumes of certain vitamins they would sell in the United States and elsewhere. Further, agreements were reached as to the submission of rigged bids for award and performance of contracts to supply certain vitamin premixes to customers located throughout the United States.

(b) During the relevant period, vitamins that were the subject of this conspiracy and sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution thereof, as well as payments thereof, traveled in interstate and foreign commerce. The business activities of Roche Ltd. and its co-conspirators, in connection with the production and sale of the vitamins affected by this conspiracy, were within the flow of, and substantially affected, interstate and foreign trade and commerce.

78. Dr. Kuno Sommer, a high-ranking Roche Ltd. official, who was required to pay a $100,000 fine and served time in a U.S. federal prison, entered a Plea Agreement on May 20, 1999 in the United States District Court for the Northern District of Texas, in which Dr. Sommer admitted:

(a) During the relevant time period, Dr. Kuno Sommer was first the North American Regional Manager for vitamins and subsequently, the Director of Worldwide Marketing of vitamins for Roche Ltd., a corporation organized and existing under the laws of Switzerland. During the relevant period, Roche Ltd. was a manufacturer of various vitamins used to enrich human food, pharmaceutical products, and animal feed in the United States and elsewhere. During the relevant period, Roche Ltd. and Dr. Kuno Sommer were engaged in the sale of these vitamins in the United States and elsewhere.

(b) During the relevant period, the defendant participated in a conspiracy with other vitamin manufacturers, and their officers and employees, the primary purpose of which was to fix, increase, and maintain the price and allocate the volume of, certain vitamins sold in the United States and elsewhere and to allocate customers in the United States. In furtherance of the conspiracy, the defendant engaged in conversations and attended meetings with representatives of other vitamin manufacturers. During such meetings and conversations, agreements were reached as to the volumes of certain vitamins the conspirators would sell, and the prices at which they would sell certain vitamins in the United States and elsewhere. Further, agreements were reached resulting in the submission of rigged and non-competitive bids for the award and performance of contracts to supply certain vitamin premixes to customers located throughout the United States.

(c) During the relevant period, vitamins that were the subject of this conspiracy and sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution thereof, as well as payments therefor, traveled in interstate and foreign commerce. The business activities of Roche Ltd., Dr. Kuno Sommer, and co-conspirators, in connection with the production and sale of the vitamins affected by this conspiracy, were within the flow of, and substantially affected, interstate and foreign trade and commerce.

(d) Dr. Sommer admitted to perjury in relation to false statements made during an interview with law enforcement officials of the United States Department of Justice, Antitrust Division, on March 12, 1997, where he stated that there was no conspiracy among the world's leading vitamins manufacturers.

79. On May 20, 1999, BASF A.G. entered a Plea Agreement in the United States District Court for the Northern District of Texas in which BASF A.G. was required to pay a fine of $225,000,000 and admitted:

(a) During the relevant period, BASF A.G., through several of its executives, officers, and employees, participated in a conspiracy with other vitamin manufacturers, the primary purpose of which was to fix, increase, and maintain the price and allocate the volume of, certain vitamins sold in the United States and elsewhere, and to allocate the volume of, certain vitamins sold in the United States. In furtherance of the conspiracy, BASF A.G., through a number of its executives, officers and employees, engaged in conversations and attended meetings with representatives of other vitamin manufacturers. During such meetings and conversations, agreements were reached as to the prices at which the conspirators would sell certain vitamins and the timing of price increases, and the volumes of certain vitamins they would sell in the United States and elsewhere. Further, agreements were reached as to the submission of rigged bids for award and performance of contracts to supply certain vitamin premixes to customers located throughout the United States.

(b) During the relevant period, vitamins that were the subject of this conspiracy and sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution thereof, as well as payments thereof, traveled in interstate and foreign commerce. The business activities of BASF A.G. and its co-conspirators, in connection with the production and sale of the vitamins affected by this conspiracy, were within the flow of, and substantially affected, interstate and foreign trade and commerce.

80. An information was filed on August 19, 1999, by the United States of America against Dr. Roland Brönnimann, President of the Fine Chemical and Vitamin Division of Roche, Ltd., alleging that:

(a) Beginning in part at least as early as January 1990 and continuing in part until February 1999, the exact dates being unknown to the United States, the defendant's corporate employer, F. Hoffmann-La Roche Ltd. ("Roche"), and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of certain vitamins manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere, and to allocate customers for vitamin premixes sold in the United States. The combination and conspiracy engaged in by the defendant and co-conspirators was an unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The defendant joined and participated in the charged conspiracy from at least as early as Spring, 1991 until at least February 1999.

(b) The charged combination and conspiracy:

i. consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators regarding certain vitamins manufactured by corporate conspirators and sold by them in the United States and elsewhere, the substantial terms of which were to:

(1) fix, increase, and maintain prices and to coordinate price increases for the sale of such vitamins in the United States and elsewhere;

(2) allocate among the corporate conspirators the volume of sales and market shares of such vitamins in the United States and elsewhere; and,

(3) allocate among corporate conspirators all or part of certain contracts to supply vitamin premixes to various customers located throughout the United States and to refrain from submitting bids, or to submit collusive, noncompetitive and rigged bids, therefor;

ii. involved a changing group of conspirators and affected a changing group of vitamins at various points in time during the period covered by this Information, its scope adjusting over time to the manufacturers producing certain vitamins and participating in the combination and conspiracy; and,

iii. affected at least the following vitamins for the indicated time periods during the combination and conspiracy charged in this Information:

(1) vitamins A and E sold in the United States and elsewhere, from January 1990 into February 1999;

(2) vitamin B2 (Riboflavin) sold in the United States and elsewhere, from January 1991 into at least Fall 1995;

(3) vitamin B5 (CalPan and/or pantothenic acid) sold in the United States and elsewhere, from January 1991 into at least December 1998;

(4) vitamin C sold in the United States and elsewhere, from January 1991 into at least the late Fall 1995;

(5) beta carotene sold in the United States and elsewhere, from January 1991 into at least December 1998; and,

(6) vitamin premixes, precursors and intermediates sold to customers located throughout the United States, from January 1991 into at least December 1997.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do including, among other things:

VITAMINS

i. participating in meetings and conversations in the United States and elsewhere to discuss the prices and volumes of vitamins A and E, vitamin B2, vitamin B5, vitamin C, and beta carotene sold in the United States and elsewhere;

ii. agreeing, during such meetings and conversations regarding such vitamins, to fix, increase, and maintain prices at certain levels in the United States and elsewhere;

iii. agreeing, during such meetings and conversations regarding such vitamins, to allocate among the corporate conspirators the approximate volume of such vitamins to be sold by them in the United States and elsewhere;

iv. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements;

v. issuing price announcements and price quotations in accordance with the above-described agreements;

vi. selling such vitamins at the agreed-upon prices and in accordance with the agreed-upon sales volume allocations in the United States and elsewhere;

VITAMIN PREMIXES

vii. participating in meetings and conversations in the United States and elsewhere to discuss the submission of prospective bids for contracts to supply vitamin premixes to various customers located throughout the United States;

viii. agreeing, during such meetings and conversations, which corporate conspirator would be designated the low bidder for particular contracts to supply vitamin premixes to various customers located throughout the United States;

ix. agreeing, during such meetings and conversations, on the prices to be submitted by the designated low bidders for particular contracts to supply vitamin premixes to various customers throughout the United States;

x. refraining from bidding, or submitting intentionally high, complementary and non-competitive bids, for particular contracts to supply vitamin premixes to various customers throughout the United States; and

xi. selling vitamin premixes to various customers throughout the United States at rigged and non-competitive prices.

81. An Information was filed on September 30, 1998, by the United States of America against Lonza, A.G., alleging that:

(a) Beginning at least as early as January 1992 and continuing until at least March 1998, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a

combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of niacin and niacinamide sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were:

i. to agree to fix and maintain prices and to coordinate price increases for the sale of niacin and niacinamide in the United States and elsewhere;

ii. to agree to allocate among the corporate conspirators the volume of sales of niacin and niacinamide in the United States and elsewhere; and

iii. to agree to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do, including, among other things:

i. participating in meetings and conversations in the United States and Europe to discuss the prices and volume of niacin and niacinamide sold in the United States and elsewhere;

ii. agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of niacin and niacinamide sold in the United States and elsewhere;

iii. agreeing, during those meetings and conversations, to allocate among the corporate conspirators the approximate volume of niacin and niacinamide to be sold by each corporate conspirator in the United States and elsewhere;

iv. agreeing, during those meetings and conversations, to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere;

v. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreement; and

vi. issuing price announcements and price quotations in accordance with the agreements reached.

82. An Information was filed on September 9, 1999, by the United States of America against Eisai Co., Ltd. ("Eisai Ltd."), alleging that:

(a) Beginning at least as early as January 1991 and continuing into at least February 1999, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of vitamin E manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and its co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-

conspirators regarding vitamin E manufactured by the corporate conspirators and sold by them in the United States and elsewhere, the substantial terms of which were to:

i. fix, increase, and maintain prices and to coordinate price increases for the sale of vitamin E in the United States and elsewhere; and,

ii. allocate among the corporate conspirators the volume of sales and market shares of vitamin E in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do including, among other things:

i. participating in meetings and conversations to discuss the prices and volumes of vitamin E sold in the United States and elsewhere;

ii. agreeing, during such meetings and conversations regarding vitamin E, to increase and maintain prices in the United States and elsewhere;

iii. agreeing, during such meetings and conversations regarding vitamin E, to allocate among the corporate conspirators the approximate volume of vitamin E to be sold by them in the United States and elsewhere;

iv. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements;

v. issuing price announcements and price quotations in accordance with the above-described agreements; and

vi. selling vitamin E at increased prices and in accordance with the agreed-upon sales volume allocations in the United States and elsewhere.

83. An Information was filed on September 9, 1999, by the United States of America against Daiichi Pharmaceutical Co., Ltd., alleging that:

(a) Beginning at least as early as January 1991 and continuing into at least February 1999, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of vitamin B5 (CalPan) manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and its co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators regarding vitamin B5 (CalPan) manufactured by the corporate conspirators and sold by them in the United States and elsewhere, the substantial terms of which were to:

i. fix, increase, and maintain prices and to coordinate price increases for the sale of vitamin B5 (CalPan) in the United States and elsewhere; and,

ii. allocate among the corporate conspirators the volume of sales and market shares of vitamin Bs (CalPan) in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do including, among other things:

i. participating in meetings and conversations to discuss the prices and volumes of vitamin B5 (CalPan) sold in the United States and elsewhere;

ii. agreeing, during such meetings and conversations regarding vitamin B5 (CalPan) to fix, increase, and maintain prices at certain levels in the United States and elsewhere;

iii. agreeing, during such meetings and conversations regarding vitamin B5 (CalPan) to allocate among the corporate conspirators the approximate volume of vitamin B5 (CalPan) to be sold by them in the United States and elsewhere;

iv. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements;

v. issuing price announcements and price quotations in accordance with the above-described agreements; and

vi. selling vitamin B5 (CalPan) at the agreed-upon prices and in accordance with the agreed-upon sales volume allocations in the United States and elsewhere.

84. An Information was filed on September 9, 1999, by the United States of America against Takeda Chemical Industries, Ltd., alleging that:

(a) Beginning at least in early 1991 and continuing into at least Fall 1995, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by

fixing the price and allocating the volume of vitamins B2 and C manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and its co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators regarding vitamins B2 and C manufactured by the corporate conspirators and sold by them in the United States and elsewhere, the substantial terms of which were to:

i. fix, increase, and maintain prices and to coordinate price increases for the sale of vitamins B2 and C in the United States and elsewhere; and

ii. allocate among the corporate conspirators the volume of sales and market shares of vitamins B2 and C in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do including, among other things:

i. participating in meetings and conversations to discuss the prices and volumes of vitamins B2 and C sold in the United States and elsewhere;

ii. agreeing, during such meetings and conversations regarding vitamins B2 and C, to fix, increase, and maintain prices at certain levels in the United States and elsewhere;

iii. agreeing, during such meetings and conversations regarding vitamins B2 and C, to allocate among the corporate conspirators the approximate volume of vitamins B2 and C to be sold by them in the United States and elsewhere;

iv. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements;

v. issuing price announcements and price quotations in accordance with the above-described agreements; and

vi. selling vitamins B2 and C at the agreed-upon prices and in accordance with the agreed-upon sales volume allocations in the United States and elsewhere.

85. An Information was filed by the United States on May 5, 2000 against Degussa-Hüls AG alleging, among other things, that:

(a) Beginning at least as early as January 1992 and continuing until at least March 1998, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of niacin and niacinamide sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were:

i. to agree to fix and maintain prices and to coordinate price increases for the sale of niacin and niacinamide in the United States and elsewhere;

ii. to agree to allocate among the corporate conspirators the volume of sales of niacin and niacinamide in the United States and elsewhere; and

iii. to agree to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do, including, among other things:

i. participating in meetings and conversations in the United States and Europe to discuss the prices and volume of niacin and niacinamide sold in the United States and elsewhere;

ii. agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of niacin and niacinamide sold in the United States and elsewhere;

iii. agreeing, during those meetings and conversations, to allocate among the corporate conspirators the approximate volume of niacin and niacinamide to be sold by each corporate conspirator in the United States and elsewhere;

iv. agreeing, during those meetings and conversations, to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere;

v. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreement; and

vi. issuing price announcements and price quotations in accordance with the agreements reached.

86. An Information was filed by the United States on May 5, 2000 against Nepera, Inc, alleging, among other things that:

(a) Beginning at least as early as January 1992 and continuing until at least March 1998, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of niacin and niacinamide sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §§ 1). The defendant joined and participated in the charged conspiracy from at least as early as January 1992 until at least July 1995.

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were:

i. to agree to fix and maintain prices and to coordinate price increases for the sale of niacin and niacinamide in the United States and elsewhere;

ii. to agree to allocate among the corporate conspirators the volume of sales of niacin and niacinamide in the United States and elsewhere; and

iii. to agree to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did those things that they combined and conspired to do, including, among other things:

i. participating in meetings and conversations in the United States and Europe to discuss the prices and volume of niacin and niacinamide sold in the United States and elsewhere;

ii. agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of niacin and niacinamide sold in the United States and elsewhere;

iii. agreeing, during those meetings and conversations, to allocate among the corporate conspirators the approximate volume of niacin and niacinamide to be sold by each corporate conspirator in the United States and elsewhere;

iv. agreeing, during those meetings and conversations, to allocate among the corporate conspirators customers of niacin and niacinamide in the United States and elsewhere;

v. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreement; and

vi. issuing price announcements and price quotations in accordance with the agreements reached.

87. An Information was filed by the United States on May 5, 2000 against Merck KGaA alleging, among other things, that:

(a) Beginning at least in early 1991 and continuing into at least Fall 1995, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of vitamin C manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere. The combination and conspiracy engaged in by the defendant and its co-conspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §§ 1).

(b) The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators regarding vitamin C manufactured by the corporate conspirators and sold by them in the United States and elsewhere, the substantial terms of which were to:

i. fix, increase, and maintain prices and to coordinate price increases for the sale of vitamin C in the United States and elsewhere; and

ii. allocate among the corporate conspirators the volume of sales and market shares of vitamin C in the United States and elsewhere.

(c) For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and

co-conspirators did those things that they combined and conspired to do including, among other things:

i. participating in meetings and conversations to discuss the prices and volumes of vitamin C sold in the United States and elsewhere;

ii. agreeing, during such meetings and conversations regarding vitamin C, to fix, increase, and maintain prices at certain levels in the United States and elsewhere;

iii. agreeing, during such meetings and conversations regarding vitamin C, to allocate among the corporate conspirators the approximate volume of vitamin C to be sold by them in the United States and elsewhere;

iv. exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreements;

v. issuing price announcements and price quotations in accordance with the above-described agreements; and

vi. selling vitamin C at the agreed-upon prices and in accordance with the agreed-upon sales volume allocations in the United States and elsewhere.

88. In Canada on September 22, 1999, F. Hoffman-LaRoche Ltd. pleaded guilty to price-fixing in violation of Canadian competition laws and was fined $48 million. Executives Dr. Roland Brönnimann and Andreas Hari also pleaded guilty and were both fined $250,000 respectively. BASF A.G. pleaded guilty to price fixing and was fined $19 million. Rhone-Poulenc SA pleaded guilty to price-fixing and was fined $14 million. Daiichi Pharmaceutical Co. Ltd. pleaded guilty to price-fixing and was fined $2.5 million. Eisai Co. Ltd. pleaded guilty to price-fixing and was fined

$2.5 million. Chinook Group. Ltd. pleaded guilty to price-fixing and was fined $2.25 million; Canadian pharmaceutical company Roussel Canada, Inc., a subsidiary of Hoechst Marion Roussel, S.A., pleaded guilty and was fined $370,000 under Canada's Competition Act for international price-fixing and market-sharing involving vitamin B-12 between 1990 and 1997.

THE CONSPIRACY

89. Defendants' activities comprised an over-arching, worldwide conspiracy to raise, stabilize and maintain the price of vitamins. This over-arching conspiracy was comprised, in turn, of a series of narrower sub-conspiracies, each focused on one vitamin, or a small group of vitamins. Each sub-conspiracy involved the global market for each vitamin or series of vitamins. All of the conspiracies were typified by certain common characteristics and activities, as set forth below.

90. The conspiracies generally were carried out with the knowledge and consent of some of the highest officials within defendants. These officials not only participated in the conspiratorial meetings, but also received oral and written reports regarding the conspiracies' activities and effects.

91. The conspiratorial meetings among defendants generally were held at hotels.

92. The conspiracies for each vitamin generally were initiated through an "ice-breaking meeting" at which defendants met to discuss the viability of a price-fixing conspiracy for a particular vitamin, each participant's share, allocation of consumers and markets, and the mechanisms of the conspiracy. The parties subsequently communicated with regard to the conspiracies through follow-up meetings throughout the world, as well as through regular telephone contact.

93. The locations of the face-to-face meetings to initiate and monitor the conspiracies included Toronto, Canada; Wilmington, Delaware (USA); Mexico City, Mexico; Ludwigshaven, Germany; Atlanta, Georgia (USA); Amsterdam; Bruge, Belgium; Jahor Bahru, Malaysia; St. Louis, Missouri (USA); Detroit, Michigan (USA); Chicago, Illinois (USA); and Paris, France.

94. The conspiracies were characterized by the following type of agreements and activities:

(a) agreements to allocate portions of the relevant market;

(b) agreements to increase prices of the products, often to specific target levels, which generally were not cost-based;

(c) agreements to establish specific pricing tiers based on volume of product purchased per year;

(d) agreements to price contracts on a quarterly, not annual, basis to increase defendants' ability to raise prices;

(e) agreements as to which defendant would announce a price increase first, and which publication's price increase announcement would constitute the "official" signal to raise prices;

(f) agreements to allocate customers and geographic regions among defendants, which included maintaining the status quo with respect to existing customers (if clients got switched from one conspirator to another, the balance was adjusted by taking a client from that company without competition or through negotiations between the two companies);

(g) sales personnel of the defendants would pursue viable business opportunities, only to be told by more senior management to drop the projects because other

defendants would not let that company participate in the targeted market;

(h) within the conspiracy, certain customers of a defendant were considered its "house" accounts and a competitor's accounts were "pass" accounts, meaning they were to be passed over and not bid on;

(i) many of the conspiracies began as United States or North American conspiracies and grew into international conspiracies, which followed the same patterns and displayed the same characteristics as those established in the United States/North American conspiracies;

(j) the international conspiracies generally lead to an agreement between the North American and European defendants for "peaceful co-existence" in which the North American companies agreed to leave the European vitamin markets and the European companies agreed to leave the North American vitamin markets;

(k) agreements to meet periodically after the initiation of a conspiracy to discuss, monitor, and correct the allocations and revenues being obtained through the conspiracy;

(l) agreements to exchange information regarding price quotes to customers and to confirm transaction prices with customers;

(m) destruction of documents reflecting the price-fixing, market-allocation and bid-rigging conspiracies when defendants feared that the conspiracies had been discovered by antitrust officials in North America and elsewhere;

(n) bribes to officials who threatened to expose the conspiracies;

(o) termination and other retaliation against officials or employees who would not participate in the

conspiracies or who threatened to expose the conspiracies; and

(q) lying to governmental investigators about the conspiracies and their scope.

95. Defendants exercised an extraordinary level of control not only over the entirety of the worldwide vitamins markets, but also over activities within their competitors' companies. For example, in March of 1993, a senior Roche executive called Lonza headquarters in Switzerland to complain that a United States sales representative of Lonza was calling on "Roche customers." The Lonza sales representative was compelled by his superiors to travel to Roche headquarters to personally explain his actions and apologize for his conduct, which conduct had threatened the conspiracy.

CLASS ACTION ALLEGATIONS

96. Plaintiffs bring this action on behalf of themselves and, under Fed. R. Civ. 23(b)(3), as representatives of the following classes (the "Classes" or "Plaintiff Classes"):

(a) Domestic Purchasers - all persons and entities domiciled in the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 through February 1999 ("the Class Period"), for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators, and their respective subsidiaries and affiliates;

(b) Foreign Purchasers - all persons and entities domiciled outside the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 through February 1999 ("the Class Period"), for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators and their respective subsidiaries and affiliates.

97. Members of each Class are numerous and joinder is impracticable.

98. Plaintiffs' claims are typical of the members of the Classes. Plaintiffs and all members of the Plaintiff Classes were damaged by the same wrongful conduct by defendants and their co-conspirators.

99. Plaintiffs will fairly and adequately protect and represent the interests of the Plaintiff Classes. The interests of plaintiffs are coincident with, and not antagonistic to, those of the Classes.

100. Plaintiffs are represented by counsel who are experienced and competent in the prosecution of complex class action and antitrust litigation.

101. Questions of law and fact common to the members of the Classes predominate over questions, if any, that may affect only individual members because defendants have acted on grounds generally applicable to the entirety of the Classes. Such generally applicable conduct is inherent in defendants' collusion.

102. Questions of law and fact common to the Classes include:

(a) whether defendants and their co-conspirators combined, agreed, and conspired among themselves to fix, maintain, or stabilize prices of, and allocate markets for Class Vitamins;

(b) the existence and duration of horizontal agreements to fix, maintain, or stabilize prices of, and allocate markets for, Class Vitamins;

(c) whether each defendant was a member of, or participant in the contract, combination and/or conspiracy as alleged;

(d) whether defendants and their co-conspirators took steps to conceal their conspiracy from the plaintiffs and the Classes;

(e) whether and to what extent the conduct of defendants and their co-conspirators caused injury to the business or property of plaintiffs and the Plaintiff Classes, and if so, the appropriate measure of damages;

(f) whether the agents, officers or employees of defendants and their co-conspirators participated in telephone calls and meetings in furtherance of the conspiracy as alleged; and

(g) whether plaintiffs and members of the Classes are entitled to declaratory and/or injunctive relief.

103. Class action treatment is the superior (if not the only) method for the fair and efficient adjudication of this controversy, in that, among other things, such treatment will permit a large number of similarly situated persons around the world to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of evidence, effort, and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that it might not be practicable to pursue individually, substantially outweigh the difficulties, if any, that may arise in management of this class action.

Fraudulent Concealment

104. Plaintiffs did not discover and could not discover, through the exercise of reasonable diligence, the existence of the claims sued upon until recently because defendants and their co-conspirators actively, intentionally and fraudulently concealed the existence of the combination and conspiracy

from plaintiffs by one or more of the following affirmative acts, including acts in furtherance of the conspiracy:

(a) covert meetings in the United States and foreign nations in which the prices, sales, volumes of sales and markets for Class Vitamins were discussed and agreed;

(b) allocating secretly among themselves customers and contracts for the sale of Class Vitamins;

(c) intentionally submitting inflated bids to customers to make other bids appear legitimate;

(d) intentionally bidding purportedly on a competitive basis when such bid was the result of collusion;

(e) offering improper payments to witnesses who have knowledge of the existence of the conspiracy to keep them silent;

(f) instructing members of the conspiracy at conspiracy meetings not to divulge the existence of the conspiracy to others not in the conspiracy;

(g) confining the anticompetitive, unlawful plan to a small number of people and officials at each defendant company;

(h) conducting covert telephone calls in the United States and foreign nations;

(i) creating documents in the ordinary course of defendants' businesses without reference to conduct that constitutes an antitrust violation or anticompetitive action; and

(j) participating in meetings and conversations to monitor and enforce adherence to the agreed-on prices and market shares.

INJURY TO PLAINTIFFS AND THE CLASSES

105. This combination and conspiracy has had the following effects, among others:

(a) the price of Class Vitamins has been fixed, raised, maintained and stabilized at artificial and non-competitive levels;

(b) buyers of Class Vitamins, including plaintiffs (and the Plaintiff Classes), have been deprived of free and open competition in the purchase of Class Vitamins; and

(c) competition in the sale of Class Vitamins has been restrained.

106. During the Class Period, plaintiffs have purchased Class Vitamins from defendants and others. By reason of the alleged violations set forth herein, plaintiffs paid more for Class Vitamins products than they would have paid in the absence of the illegal combination and conspiracy and, as a result, they have been injured in their business and property and have suffered damages in an amount presently undetermined.

COUNT I
VIOLATION OF SHERMAN AND CLAYTON ACTS
(ON BEHALF OF DOMESTIC AND FOREIGN PURCHASERS)

107. Plaintiffs incorporate the allegations described in Paragraphs 1 through 105 above as if fully set forth herein.

108. During the Class Period, defendants sold and shipped substantial quantities of Class Vitamins in a continuous and uninterrupted flow of interstate and foreign commerce. Defendants received payment for such products across state and national boundaries. Defendants' activities, and the sale of their products, have both taken place, and have had a substantial anticompetitive effect upon, interstate commerce within the United States and foreign commerce.

109. Defendants' anticompetitive activities and their effects are in violation of both the Sherman and Clayton Acts.

110. Defendants' anticompetitive activities and their effects have caused injury to the Plaintiff Classes both inside the United States and in foreign nations.

111. Plaintiffs and the Plaintiff Classes seek damages for these injuries, injunctive relief, and any such other relief that the Court deems necessary and appropriate.

COUNT II
VIOLATION OF FOREIGN ANTITRUST LAWS
(ON BEHALF OF FOREIGN PURCHASERS)

112. Plaintiffs incorporate the allegations described in Paragraphs 1 through 110 above as if fully set forth herein.

113. During the Class Period, defendants sold and shipped substantial quantities of Class Vitamins in a continuous and uninterrupted flow of foreign commerce. Defendants received payment for such products across national boundaries. Defendants' activities, and the sale of their products, have both taken place, and have had a substantial anticompetitive effect upon, foreign commerce.

114. Defendants' anticompetitive activities and their effects are in violation of the competition laws of the relevant foreign nations.

115. Defendants' anticompetitive activities and their effects have caused injury to the Plaintiff Classes in foreign nations.

116. Plaintiffs and the Plaintiff Classes seek damages for these injuries, injunctive relief, and any such other relief that the Court deems necessary and appropriate.

COUNT III
VIOLATION OF INTERNATIONAL LAW
(ON BEHALF OF FOREIGN PURCHASERS)

117. Plaintiffs incorporate the allegations described in Paragraphs 1 through 115 above as if fully set forth herein.

118. International law is comprised of rules that have been accepted by the international community of states in the form of customary international law, international agreements, or by derivation from general principles common to the major legal systems of the world. Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. Widely accepted international agreements or common and pervasive legal principles can define and augment what nations view as mutual legal obligations.

119. International treaties are considered to be incorporated into United States federal law. Customary international law is considered to be federal common law. Both of these are capable of being enforced by federal courts. Federal courts can ascertain what activities are proscribed by international law by consulting works of jurists, scholarly writings, by the general usage and practice of nations, and by judicial decisions recognizing and enforcing that law.

120. International prohibitions against anticompetitive commercial activity have become so prevalent that they must be deemed to have risen to the level of the law of nations. Treaties, international agreements, scholarly writings, and the laws of the major legal systems of the world demonstrate the widely-accepted view that participation in anticompetitive commercial activity is universally harmful to basic human rights.

121. In the last five to ten years, the number of countries that have antitrust laws in defense of free markets has increased to over eighty (80) countries, with an additional

twenty-five (25) countries in the process of drafting such laws.

122. For example, the United Nations adopted in 1980 "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" ("The Set"), which sets forth what the member nations of the United Nations consider to be internationally-accepted principles prohibiting anti-competitive conduct. The Set reflects the view that multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective of establishing a new international economic order by eliminating restrictive business practices adversely affecting international trade, thereby contributing to the development and improvement of international economic relations on a just and equitable basis. To further the goals of "promoting social welfare in general and, in particular, the interests of consumers in both developed and developing countries," The Set calls on commercial entities to refrain from engaging in restrictive commercial practices, including price-fixing agreements, market or customer allocation agreements, predatory behavior, discriminatory pricing, and abuse of dominant market positions.

123. In 1998, the OECD, an organization of 29 industrialized nations, approved a Counsel Recommendation Concerning Effective Action Against Hard Core Cartels. The OECD characterized anticompetitive cartels as "the most egregious violation of competition law," which "injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others." The OECD in 2000 identified the Vitamins global cartel as one of the most harmful cartels ever formed.

124. On September 30, 1999, Joel Klein, then Assistant Attorney General, Antitrust Division, U.S. Department of Justice, noted "the dawn of a new era in antitrust enforcement

against international cartels." He further noted the recognition by "people all over the world . . . that cartels . . . are a true scourge of the world economy," that "don't just hurt consumers in the U.S. or any single country . . .[but, a]lmost by definition, they hurt consumers world-wide."

125. Defendants have engaged in anticompetitive activities in the United States and world-wide which violate widely-accepted norms of international law, including: fixing the price of vitamins; allocating vitamin customers, and committing other unlawful practices, as specified herein, to inflate the prices of Class Vitamins worldwide.

126. Defendants' anticompetitive activities violate international law.

127. Defendants' illegal activities are the direct cause of harm to those purchasing Class Vitamins for delivery outside the U.S., who have been forced to pay higher and/or unnecessary costs as a result of these anticompetitive activities worldwide. Plaintiffs seek damages for this harm, as well as injunctive relief and any other relief that the Court deems necessary and appropriate.

PRAYER FOR RELIEF

A. That the Court determine that this action may be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and direct that reasonable notice of this action, as provided by Rule 23(c)(2) of the Federal Rules of Civil Procedure, be given members of the Plaintiff Classes;

B. That the unlawful combination and conspiracy alleged herein be adjudged and decreed to be an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), the antitrust laws of relevant foreign nations, and international law;

C. That plaintiffs and each member of the Classes recover damages, as provided by law, determined to have been sustained by each of them (using such damage methodology as may be appropriate at trial), and that joint and several judgments in favor of the plaintiff Classes be entered against defendants, and each of them;

D. That defendants be enjoined from continuing the unlawful combination and conspiracy alleged herein and other appropriate injunctive relief;

E. That the plaintiffs and the Classes recover their costs of this suit, including reasonable attorneys' fees as provided by law; and

F. That plaintiffs and the Classes be granted such other, further and different relief as the nature of the case may require or as may be deemed just and proper by this Court.

JURY DEMAND

Plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

Dated: November 14, 2000

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 00-1686 (TFH)

EMPAGRAN S.A., *et al.*
Plaintiffs,

v.

F. HOFFMAN-LA ROCHE, LTD., *et al.*
Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Joint Motion to Dismiss the federal antitrust claims brought by the foreign plaintiffs is GRANTED. It is further hereby

ORDERED that, within fifteen days of this Order, The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. either supplement their federal antitrust allegations in the Amended Complaint to provide further detail on the location of the domestic plaintiffs' injuries and the effect of the defendants' conduct, which caused these injuries, on United States commerce or file written stipulations of dismissal. It is further hereby

ORDERED that the Court will reserve ruling on the jurisdictional, standing, and consolidation questions with respect to the domestic plaintiffs' federal antitrust claims pending the filing of these more detailed allegations. And it is further hereby

ORDERED that defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Class Action Complaint is GRANTED.

June 7, 2001

/s/ _____
Thomas F. Hogan
United States District Judge

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(10)

No. 03-724

Supreme Court, U.S.
FILED
FEB 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,
Petitioners,

v.

EMPAGRAN, S.A., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether respondents, five foreign companies that purchased goods outside the United States from other foreign companies, may pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce.

PARTIES TO THE PROCEEDINGS BELOW

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., Hoechst Marion Roussel S.A., Rhône-Poulenc S.A., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corp., Daiichi Fine Chemicals, Inc., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Bioproducts Incorporated, Chinook Group Ltd., Cope Investments Ltd., Degussa AG, Degussa Corp., DuCoa, L.P., DCV, Inc., EM Industries, Inc., Merck KGaA, E. Merck, Lonza Inc., Lonza AG, Alusuisse-Lonza Group Ltd, Mitsui & Co., Ltd., Nepera, Inc., Reilly Chemicals, S.A., Reilly Industries, Inc., Sumitomo Chemical Co., Ltd., Sumitomo Chemical America, Inc., Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents: Empagran, S.A., Nutricion Animal, S.A., Winddridge Pig Farm, Brisbane Export Corp. Pty, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

Petitioners have provided the statement required by Rule 29.6 of this Court in the petition for writ of certiorari. That statement is currently accurate, except that it includes information regarding EM Industries, Inc., Merck KGaA and E. Merck, which had joined in the petition but have not joined in this brief.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. RESPONDENTS' CLAIMS FALL OUTSIDE THE EXTRATERRITORIAL SCOPE OF THE SHERMAN ACT BECAUSE THEY ARISE FROM INJURIES SUSTAINED IN PURELY FOREIGN COMMERCE	11
A. Extraterritorial Application of the Sherman Act Has Always Been Justified by Concern for Effects of Anti-competitive Conduct on U.S., Not Foreign, Commerce	11
B. The FTAIA Expressly Precludes Extra-territorial Application of the Sherman Act to Claims that, Like Respondents', Do Not Arise from an Anticompetitive Effect on U.S. Commerce	14

TABLE OF CONTENTS—Continued

	Page
C. The Deterrence Rationale Invoked by the Court of Appeals Cannot Justify its Ruling	37
D. Respondents' "Global Conspiracy" Allegations Do Not Bring Their Claims Within the Scope of the Sherman Act	39
II. THE PRIVATE DAMAGES REMEDY CONFERRED BY SECTION 4 OF THE CLAYTON ACT DOES NOT PERMIT RECOVERY FOR INJURIES SUSTAINED IN PURELY FOREIGN TRANSACTIONS	42
CONCLUSION	46

TABLE OF AUTHORITIES

U.S. CASES	Page
Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981)	30
American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)	25
American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)	12
Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	27, 41, 42, 43, 44
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Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975)	26
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Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	43-44, 45
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)	43
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	13
Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002)	5, 6, 15, 19, 29, 34, 40
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Duncan v. Walker, 533 U.S. 167 (2001)	20
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Hanover Shoe, Inc. v. United Shoe Machine Corp., 392 U.S. 481 (1968)	27

TABLE OF AUTHORITIES—Continued

Page

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)..... 13, 21-22, 25, 30-31, 40
Holloway v. United States, 526 U.S. 1 (1999)..... 16-17
Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992) 27, 44
Home Ins. Co. v. Dick, 281 U.S. 397 (1930)..... 30
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Industria Siciliani Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. Jan. 18, 1977)..... 31
Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)..... 16-17
Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340) 8
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Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11, 39-40, 42-43, 44-45
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)..... 21, 22
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)..... 24
Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 16
Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968)..... 35
Pegram v. Herdrich, 530 U.S. 211 (2000) 25
Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).....6, 10, 37, 43
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 30
Pierce County v. Guillen, 537 U.S. 129 (2003)..... 31

TABLE OF AUTHORITIES—Continued

Page

Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1958) 22
Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993)..... 21
Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) 28-29
Thomsen v. Cayser, 243 U.S. 66 (1917)..... 12
Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Pa. 1974)..... 31
Turicentro, S.A. v. American Airlines, Inc., 303 F.3d 293 (3d Cir. 2002) 45
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United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) 12-13, 21
United States v. Nevils, 897 F.2d 300 (8th Cir. 1990)..... 28
United States v. Nordic Village, Inc., 503 U.S. 30 (1992)..... 20
United States v. Sisal Corp., 274 U.S. 268 (1927)..... 12
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 15, 45
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. ___, No. 02-682, 72 U.S.L.W. 4114 (Jan. 13, 2004)..... 44
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TABLE OF AUTHORITIES—Continued

Page

Warth v. Seldin, 422 U.S. 490 (1975) 15
Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 13
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U.S. CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 8[3] 29
15 U.S.C. § 1 ..... 4, 11, 42
15 U.S.C. § 2 11
15 U.S.C. § 4 42
15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982) ..... *passim*
15 U.S.C. § 15 ..... 4, 5, 42
15 U.S.C. § 26 ..... 4, 43
15 U.S.C. § 45 17
18 U.S.C. § 3571 38
28 U.S.C. § 1254 2
28 U.S.C. § 1350 5

FOREIGN CONSTITUTIONAL PROVISIONS AND STATUTES

Panama Const. art. 290 24
Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.) (*as amended*) 23
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Law 29 of 1996, arts. 5, 11, 27 (Panama) 24

TABLE OF AUTHORITIES—Continued

Page

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Page

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Page

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IN THE

Supreme Court of the United States

No. 03-724

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court's dismissal of respondents' claims.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 338. Pet. App. 1a-42a. The orders of the court of appeals denying petitioners' petition for rehearing and petition for rehearing en banc are unreported. Pet. App. 43a, 44a. The opinion of the district court is unreported. Pet. App. 45a-62a.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2003. Petitioners' timely petitions for rehearing and for rehearing en banc were denied on September 11, 2003. Pet. App. 43a-44a. The petition for a writ of certiorari was filed on November 13, 2003, and was granted on December 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes relevant to this proceeding, Sections 1 and 7 of the Sherman Act, 15 U.S.C. §§ 1, 6a, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are reprinted in the appendix to this brief.

STATEMENT

The court of appeals incorrectly held that respondents—five foreign companies that purchased vitamins outside the United States from other foreign companies—can assert price-fixing claims under U.S. antitrust law even though they sustained their injuries in purely foreign commercial transactions. The court reached this erroneous conclusion by misconstruing the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, to achieve a result contrary to that statute's plain text and manifest purpose. Congress passed this law to *restrict* the extraterritorial application of the Sherman Act and preclude cases, such as this one, where the plaintiff's claim arises from an injury sustained in transactions conducted entirely within or between countries other than the United States. Injuries sustained in such "purely foreign" transactions fall outside the scope of U.S. antitrust regulation, whether the participants are foreign companies (as here) or U.S. companies operating abroad.

The FTAIA prohibits the application of the Sherman Act to conduct "involving foreign trade or commerce" unless two conditions are satisfied: first, the conduct must have "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce; and second, "such effect" on U.S. commerce must "give[] rise to a claim" under the Sherman Act. § 6a. The court of appeals misread this restrictive statute as *expanding* U.S. antitrust jurisdiction to regulate transactions that occur entirely outside U.S. commerce. The court interpreted the FTAIA as authorizing a Sherman Act claim whenever conduct that affected such foreign transactions *also* affected U.S. commerce and those U.S. effects "give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a. Based on this incorrect reading of the FTAIA, the court of appeals reversed the district court's dismissal of respondents' claims for lack of subject matter jurisdiction and, further, held that respondents have standing under Section 4 of the Clayton Act to seek damages for their purely foreign injuries.

The court of appeals' ruling turns a restrictive amendment to the Sherman Act on its head. It transforms the FTAIA, which was intended to limit the Sherman Act's extraterritorial scope, into an assertion of regulatory authority over transactions taking place entirely in foreign countries. The court of appeals' decision is contrary to the natural reading of the FTAIA endorsed by the Department of Justice and conflicts with longstanding principles governing the construction of federal legislation. The FTAIA, properly construed, confines application of U.S. antitrust law to suits complaining of the effects of anticompetitive conduct on U.S. commerce. Moreover, the private right of action invoked by respondents under Section 4 of the Clayton Act provides no remedy for injuries sustained in purely foreign commercial transactions.

1. Numerous civil and criminal proceedings have been instituted both in the United States and abroad challenging

alleged cartel activity in the vitamins industry. More than seventy-five federal civil antitrust cases, including class actions, were filed beginning in 1998 and consolidated for pretrial proceedings in the district court. Virtually all the claims in those cases have now settled for amounts exceeding $2 billion. In addition to the federal actions, over twenty actions have been filed by state attorneys general and over one hundred lawsuits have been brought by indirect purchasers under various state laws.

Beginning in 1999, before any significant proceedings in the civil cases, several petitioners pleaded guilty to federal criminal antitrust violations for fixing prices of vitamins sold in the United States. Criminal fines totaling $900 million were imposed on these entities collectively. See Pet. App. 68a. Several senior executives, including foreign nationals, also pleaded guilty to felony price-fixing charges and served prison terms. Outside the United States, record civil penalties exceeding $1 billion were assessed against some petitioners by the European Union, Canada, Australia and Korea. Pet. App. 68a. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium and the Netherlands, and class actions have been filed in Canada, Australia and New Zealand.

Respondents are five foreign companies located in Australia, Ecuador, Panama and Ukraine. They initiated this action in July 2000, alleging that petitioners had conspired to fix prices and allocate markets for vitamins on a global basis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. They purport to represent a class of all foreign entities that purchased vitamins for delivery in foreign countries, and they seek treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for injuries allegedly sustained as a result of those purchases. Am. Comp. ¶¶ 7, 111, J.A. 16, 63. Respondents have not asserted that

they purchased vitamins in the United States or in transactions in U.S. commerce.

2. The district court dismissed respondents' federal antitrust claims for lack of subject matter jurisdiction. The court considered the "critical question" to be "whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries give[] persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." Pet. App. 48a. The district court concluded that they did not, relying on the limited extraterritorial reach of the U.S. antitrust laws generally and, in particular, the FTAIA. *Id.* at 48a-52a. The district court construed subsection (2) of the FTAIA, 15 U.S.C. § 6a(2), to require that "the injuries [plaintiffs] seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce." *Id.* at 49a. Dismissal was necessary, the court reasoned, because respondents had not alleged that the "injuries for which they seek redress"—*i.e.*, their alleged injuries from purchasing vitamins in foreign countries—"have the requisite domestic effects necessary to provide subject matter jurisdiction." *Id.*

The district court noted that its ruling was supported by existing case law, including the Fifth Circuit's decision in *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002), which was then the only decision by a court of appeals addressing the question. Pet. App. 50a-51a. The district court did not reach petitioners' alternative argument that respondents lacked standing to assert their claims under Section 4 of the Clayton Act, 15 U.S.C. § 15. Pet. App. 62a.[1]

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[1] The district court also dismissed respondents' claims for purported violations of "customary international law" under the Alien Tort Claims Act, 28 U.S.C. § 1350. Pet. App. 61a-62a. In addition, it declined to assert

3. The court of appeals reversed, interpreting subsection (2) of the FTAIA to authorize application of the Sherman Act to complaints of injuries sustained in purely foreign transactions. Rejecting the Fifth Circuit's contrary ruling in *HeereMac*, the D.C. Circuit construed the FTAIA's requirement that a U.S. effect give rise to "a claim" to mean that whenever "*someone*, even if not the foreign plaintiff who is before the court," has a claim arising from an effect of the defendant's conduct on U.S. commerce, anyone with a claim arising from a purely foreign effect of that conduct can sue as well. *Id.* at 4a, 19a–20a (emphasis added).

The D.C. Circuit did not rest its conclusion on the text of the FTAIA, which it believed has "no 'plain meaning.'" *Id.* at 4a. Instead, the court of appeals relied on selected statements in the House Judiciary Committee Report on the FTAIA that it deemed "consistent" with its holding and more significant than other statements in the House Report supporting the Fifth Circuit's construction of the statute. *Id.* at 24a-30a. Most important for the court, however, was its determination that, as a matter of policy, "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." *Id.* at 32a. The court did not consider the numerous deterrents otherwise existing under U.S. and foreign law, instead citing generalized "underlying policies of deterrence" that it found "emanating" from this Court's decision in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). Pet. App. 4a, 32a-33a. The court also held that respondents have standing to assert a claim for damages under the Clayton Act. *Id.* at 33a-37a.

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supplemental jurisdiction over respondents' remaining claims based on unspecified "competition laws of the relevant foreign nations." *Id.* at 58a, 60a.

Judge Henderson dissented. She explained that "the plain language" of subsection (2) of the FTAIA "expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under" subsection (1). *Id.* at 42a. She added that the Fifth Circuit's construction of subsection (2)—requiring that the plaintiff's own injuries "arise from" an effect on U.S. commerce—reflects the "more natural" reading of the provision and is "unambiguously supported" by the legislative history. *Id.* at 40a.

4. On petition for rehearing en banc, the court of appeals invited the Solicitor General to submit a brief expressing the views of the United States. In response, the Solicitor General urged en banc review to reverse the decision below.[2] The Solicitor General disagreed with the panel's ruling, explaining that the "most natural reading" of the FTAIA "is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." *Id.* at 74a (emphasis in original). The Solicitor General also criticized the opinion's deterrence rationale. "[C]onsiderations based on deterrence," the Solicitor General explained, "counsel *against* the panel's expansive interpretation of the FTAIA," because increasing the potential liability of antitrust offenders worldwide will discourage them from voluntarily disclosing misconduct to the Department of Justice under its corporate leniency program. *Id.* at 78a (emphasis in original).

Notwithstanding the position of the United States, the D.C. Circuit denied rehearing en banc by a 4 to 3 vote, with Judges Sentelle, Henderson and Randolph voting to grant rehearing and Judges Garland and Roberts not participating.

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[2] Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc, *Empagran, S.A., et al., v. F. Hoffmann-La Roche, Ltd, et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115). Pet. App. 63a-81a.

SUMMARY OF ARGUMENT

The antitrust laws of the United States do not permit respondents—foreign companies that purchased vitamins from foreign sellers for use in foreign countries—to seek damages for overcharges they paid in their home countries. It makes no difference that similar overcharges were allegedly paid by others in the United States or that the overcharges here and abroad both resulted from an alleged "global conspiracy." The U.S. antitrust laws may be applied extraterritorially only if conduct outside the United States had a direct and substantial effect on U.S. commerce, and then only to redress injury resulting from that U.S. effect.

The federal antitrust laws were designed to protect American markets and American consumers and have no application to foreign transactions that do not affect U.S. commerce. This Court and the lower federal courts have consistently recognized that it is concern over the direct U.S. consequences of anticompetitive conduct that justifies the extraterritorial application of federal law. The recent decisions by the D.C. Circuit in this case and by the Second Circuit in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340), both of which approved the application of U.S. antitrust law in cases complaining of purely foreign injuries, mark a radical departure unsupported by any precedent of this or any other court. These decisions open the federal courts to large numbers of complex antitrust disputes of no interest to the United States—suits by plaintiffs claiming injury from purely foreign transactions governed by the competition laws of the countries where they occurred. Permitting such claims would cause an enormous drain on the judicial resources of the United States.

The U.S. antitrust laws were not applied to purely foreign transactions such as respondents' vitamin purchases before the FTAIA was enacted, and the FTAIA—a jurisdiction

limiting statute—did not enlarge the extraterritorial scope of U.S. antitrust law. The statute's text confines U.S. antitrust jurisdiction to cases complaining of the U.S. effects of anticompetitive conduct. It provides, in a series of restrictive clauses, that U.S. antitrust law "shall not apply" extraterritorially *unless* the conduct complained of had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce *and* "such effect gives rise to a claim." As the Solicitor General has explained, this language limits antitrust claims to those complaining of injury arising from a U.S. effect.

The contrary reading by the court of appeals—that the FTAIA permits a plaintiff alleging injury from the foreign effects of anticompetitive conduct to sue under federal law whenever *someone else* has a claim arising from the U.S. effects of that conduct—not only conflicts with the statute's text but also flouts the rule that federal law should be construed to avoid infringing the prerogatives of foreign sovereigns. Foreign nations have a strong interest in applying their own domestic competition policies, including their own decisions about appropriate remedies, to transactions occurring in their own countries. It is inconceivable that Congress would have opened U.S. courts to plaintiffs from all over the world, or authorized an unprecedented species of claim requiring a preliminary showing that *someone else* was injured by effects of the same conduct on commerce in a *different* country (*i.e.*, the United States), without clearly stating its intent to do so. Serious doubt as to whether Congress even has the power to regulate purely foreign transactions provides further ground for rejecting such an interpretation.

As of the time Congress enacted the FTAIA, no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce, and virtually all academic commentary urged that the focus of U.S. antitrust

law be restricted to claims arising from effects of anticompetitive conduct on U.S. commerce. Nothing in the legislative history suggests that Congress intended to depart from that consensus. Instead, it confirms that Congress passed the FTAIA to limit, not enlarge, the extraterritorial reach of federal antitrust law.

The court of appeals' policy judgment that permitting claims by foreign plaintiffs is "necessary to protect U.S. commerce from global conspiracies" is unfounded and opposed by the Solicitor General, who has warned that the ruling below will hinder, not advance, deterrence. Nor is it supported, as the D.C. Circuit claimed, by this Court's opinion in *Pfizer*, 434 U.S. 308, which decided a very different question and had no occasion to consider whether purely foreign injuries could give rise to a U.S. antitrust claim. The supposedly "global" nature of the alleged conspiracy does nothing to bring respondents' claims within the ambit of the FTAIA. It cannot alter the fact that the injuries they complain of—overpayments for vitamins purchased from other foreign companies outside the United States—resulted from supracompetitive pricing in their home countries, not from any effect on the United States.

Finally, respondents' claims to recover damages for purely foreign injuries are not actionable under Section 4 of the Clayton Act. That provision permits recovery only for injuries sustained "by reason of" an impairment of *U.S. commerce* that the federal antitrust 'aws are designed to prevent. As this Court frequently has recognized, Section 4 does not confer a right to relief for all consequences that can somehow be linked to illegal conduct. It provides a remedy only for those consequences that the antitrust laws were designed to prevent—*i.e.*, harms to U.S. commerce. Respondents' purely foreign injuries do not result from any such harm, and respondents therefore lack standing to pursue their claims.

ARGUMENT

I. RESPONDENTS' CLAIMS FALL OUTSIDE THE EXTRATERRITORIAL SCOPE OF THE SHERMAN ACT BECAUSE THEY ARISE FROM INJURIES SUSTAINED IN PURELY FOREIGN COMMERCE.

A. Extraterritorial Application of the Sherman Act Has Always Been Justified by Concern for Effects of Anticompetitive Conduct on U.S., Not Foreign, Commerce.

"American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). On its face, the Sherman Act is concerned with the competitive conditions of U.S. commerce, including import and export commerce between the United States and foreign nations. Section 1 forbids any "conspiracy * * * in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 similarly prohibits any attempt or conspiracy to "monopolize any part of the trade or commerce among the several States, or with foreign nations." § 2. Nothing in the Sherman Act suggests any purpose to regulate, or any concern over the consequences of anticompetitive conduct on, transactions occurring entirely *within* or *between* foreign countries. See 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. 2000) ("Congress did not intend American antitrust law to rule the entire commercial world"). This Court's precedents reflect an exclusive concern with the effects of anticompetitive conduct on U.S. commerce. In every case where this Court has applied U.S. antitrust laws to foreign activity, the gravamen of the plaintiff's claim was an injury sustained from harm to competition in U.S. commerce.

When first presented with the question in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), this Court held that the Sherman Act was inapplicable to conduct occurring outside the territory of the United States. *Id.* at 357. That strict territorial limitation has since been modified, but only to the extent that activities occurring outside the United States have inflicted anticompetitive effects on competition or consumers in U.S. commerce. See, *e.g.*, *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (approving application of Sherman Act to agreements regarding shipping between United States and foreign country that "affected the foreign commerce *of this country*") (emphasis added); *United States v. Sisal Corp.*, 274 U.S. 268, 276 (1927) (approving application of Sherman Act to agreements to restrain competition on U.S. imports and domestic market for foreign goods that "brought about forbidden results *within the United States*") (emphasis added).

The modern rationale for extraterritorial application of the Sherman Act was stated by the Second Circuit, sitting as the court of last resort in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.) ("*Alcoa*"). A foreign cartel had restricted the import of aluminum ingot into the United States. In determining whether the Sherman Act reached the defendants' extraterritorial conduct, Judge Hand explained that principles of international law presumptively limit the extraterritorial reach of federal legislation:

> "[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law * * * that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." 148 F.2d at 443 (citations omitted).

Judge Hand therefore construed the Sherman Act to regulate foreign conduct that both was intended to affect U.S. commerce and in fact did so. *Id.* at 443-44.

This Court has repeatedly endorsed *Alcoa*'s rationale that the U.S. effects of foreign activities are the justification for applying U.S. antitrust law to those activities. Most recently, in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), the Court explained that the Sherman Act was appropriately applied to international conspiracies that were directed at, and had a "substantial effect" on, the market for insurance in the United States. *Id.* at 796. See also, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 113 n.8 (1969) (restraint on "exports from the United States" justified liability under U.S. law); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (same). In none of these cases was the effect on U.S. commerce simply a pretext for remedying some *other* harm allegedly sustained by the plaintiff outside U.S. commerce. Rather, in each case the injury for which redress was sought was a harm that arose from an effect of the defendants' conduct on commerce within the United States or between the United States and a foreign country.

Lower court decisions also respect these limits on the extraterritorial scope of the antitrust laws. As the Solicitor General has observed, as of 1982, when the FTAIA was enacted, no court had ever held that a plaintiff could pursue a federal antitrust claim based on injuries sustained entirely outside U.S. commerce. Pet. App. 80a. Indeed, respondents conceded in the district court that, as of the time of argument, no court ever had interpreted the federal antitrust laws to reach wholly foreign transactions such as those at issue in this case. Pet. App. 52a. The absence of precedent supporting respondents' reading reflects the U.S. antitrust laws' histori-

cally exclusive concern with the conditions of U.S. commerce—an exclusive focus that, as explained below, the FTAIA was designed to reinforce.

B. The FTAIA Expressly Precludes Extraterritorial Application of the Sherman Act to Claims that, Like Respondents', Do Not Arise from an Anticompetitive Effect on U.S. Commerce.

Nothing in the FTAIA suggests a purpose to enlarge the extraterritorial reach of the federal antitrust laws by authorizing claims based on purely foreign injuries. The statute states that, for the Sherman Act to apply to foreign conduct, that conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and that U.S. effect must "give[] rise to a claim." Properly construed, this language requires that the claim of the plaintiff invoking the authority of the court arise from the effect on U.S. commerce. 1A AREEDA ET AL., ANTITRUST LAW ¶ 272h2 ("[A] foreign consumer whose only injury is felt entirely in his foreign country cannot [sue]"). The text and context of the statute, as well as longstanding principles governing the construction of federal law, leave no room for the court of appeals' contrary interpretation that the statute permits any plaintiff injured by the foreign effects of anti-competitive conduct to sue if that conduct also produced a U.S. effect that "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a.

1. *The FTAIA expressly limits extraterritorial application of the Sherman Act to claims that "arise" from an anticompetitive effect on U.S. commerce.*

a. ***Express language.*** The plain language of the FTAIA restricts the extraterritorial scope of the Sherman Act. The statute begins with the general prohibition that the Sherman

Act "shall not apply" to conduct involving foreign commerce "unless" two fundamental conditions are satisfied. 15 U.S.C. § 6a. Its negative terminology does not affirmatively authorize claims of any kind. Each statutory condition ties extraterritorial application of the Sherman Act to the U.S. effects of the challenged conduct. The first condition requires that the conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. § 6a(1). This provision makes clear that the Sherman Act does not reach foreign activity that results in only indirect, insubstantial or unforeseeable effects on U.S. commerce.

The second condition requires that "such effect gives rise to a claim" under the Sherman Act. § 6a(2). The indefinite article "a" refers generically to "a claim" of the plaintiff—*i.e.*, *any* claim that the plaintiff may have "under the provisions of sections 1 to 7" of the Sherman Act. *Id.* As the Solicitor General has stated, "the most natural reading" of this second condition "is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." Pet. App. 74a (emphasis in original). See also *HeereMac*, 241 F.3d at 428 ("plain language" of FTAIA precludes claims for overseas injury that "arises from effects in a non-domestic market"). Subsection (2) requires that a U.S. effect give rise to the *particular* claim asserted by the plaintiff in the case before the court—not the abstract claim of some unidentified person purchasing products in another nation.

It is fundamental that litigants can assert only their *own* claims. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties"); see also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). A litigant's claim has never been conditioned on a showing that another potential litigant has a similar claim. Given this legal tradition, it is highly implausi-

ble that Congress intended to embrace the novel notion that a plaintiff may assert an otherwise non-cognizable claim if he can demonstrate that some *other* person has "a claim" that arises from some *other* effect—*i.e.*, a U.S. effect different from the foreign effect that gave rise to the plaintiff's own claim.

The use of the article "a" in subsection (2) hardly suggests that Congress intended the dramatic broadening of the antitrust laws that respondents advocate. See *Gustafson v. Alloyd Inc.*, 513 U.S. 561, 575 (1995) (refusing to "ascrib[e] to one word a meaning so broad that it * * * giv[es] 'unintended breadth'" to a statute) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This Court has refused to rely myopically on the use of "[t]he article 'a'" when interpreting the scope of a statute. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998). Here, read in context, the statutory language refutes respondents' sweeping construction. The only reasonable reading is that it requires a plaintiff to have suffered an injury as a result of anticompetitive effects in U.S. commerce. This reading comports with the longstanding principle of antitrust standing (discussed below, *infra*, pp. 42-46) that a plaintiff must *himself* have suffered an injury that the antitrust laws were designed to prevent—a principle that, as the Solicitor General has explained, was "incorporated" into the FTAIA through the requirement that *the plaintiff's* claim must "arise from" the requisite anticompetitive effect on U.S. commerce. Pet. App. 75a.

b. ***Statutory structure.*** The statute's structure supports this interpretation. The proximity of the first condition (that the conduct complained of must cause a U.S. effect) to the immediately following condition (that such U.S. effect must "give[] rise to a claim") demonstrates an intention by Congress that *all* Sherman Act claims *must* arise from a U.S. effect. See *Holloway v. United States*, 526 U.S. 1, 6 (1999)

(courts must consider "placement" of statutory phrase); see also *Jarecki*, 367 U.S. at 307 (surrounding language indicated that statutory provision was intended to have "a precise and narrow application").

The two conditions imposed by subsections (1) and (2) are also followed by a concluding proviso that imposes yet another restriction tied strictly to U.S. effects. It provides that, when jurisdiction exists under subsection (1) as a result of an effect on export commerce of "a person engaged in such trade or commerce in the United States," the Sherman Act shall apply "*only* for injury to export business *in the United States*." § 6a (emphasis added). This provision makes clear that, even where there are effects on export commerce from the United States, the Sherman Act will apply *only* with respect to injuries to the domestic exporter, not injuries to a foreign purchaser of the exported goods.

Finally, Congress's use of the same phraseology in contemporaneous amendments to the Federal Trade Commission Act ("FTCA") belies the notion that the "a claim" language in the FTAIA was intended to authorize a plaintiff to assert a claim arising from a foreign effect whenever some other person has "a claim" arising from a U.S. effect. Those amendments provide that the FTCA's prohibition on unfair methods of competition "shall not apply" unless those methods have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and "such effect gives rise to a claim under [the FTCA]." 15 U.S.C. § 45(a)(3). Only the Federal Trade Commission may assert a claim under the FTCA; there is no private right of action. Accordingly, in § 45(a)(3), the language "a claim" necessarily refers to *the claim* of the Federal Trade Commission itself, because the Federal Trade Commission is the *only* potential plaintiff under the FTCA. Similarly, in the FTAIA, the "a claim" language refers to the claim of the plaintiff before the court, not some other potential plaintiff.

In short, the limiting language employed by Congress in the FTAIA repeatedly returns to U.S. domestic effects as the essential concern of the antitrust laws. These limitations cannot plausibly be read—as the court of appeals read them—to *expand* the Sherman Act's jurisdictional reach to permit claims that arise from the foreign effects of anticompetitive conduct on foreign commerce. As the Solicitor General has explained, "[the FTAIA's] text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." Pet. App. 75a.

c. ***Sensible construction.*** Respondents nowhere come to grips with the governing statutory language and structure of the FTAIA, and they offer no sensible explanation for their proffered interpretation. Their reading of the "a claim" language of subsection (2) is, in fact, contradicted by the only contemporaneous explanation given for its inclusion. The bill initially reported by the House Judiciary Committee required that an effect on domestic commerce be "the basis of the violation alleged" under this Act. H.R. Rep. No. 97-686, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2500. Chairman Rodino explained that this language was changed to state that the effect must "give[] rise to a claim" only as a "minor clarification," because technically an "effect" does not give rise to a "violation" but rather to "a claim," and he emphasized that the "substitute language accomplishes the same effect as the [original] committee version * * *." *Id.* at 18. This explanation refutes any argument that Congress used the indefinite article "a" before "claim" in order to enlarge the extraterritorial scope of the Sherman Act.

Respondents nonetheless complain that the reading of subsection (2) endorsed by the Solicitor General and the Fifth Circuit would subject the same "unitary" conduct to U.S. antitrust regulation in some cases and not in others, depending on whether the plaintiff's claim arose from an injury to

U.S. commerce or an injury to foreign commerce. Br. in Opp. 20. But that result is entirely consistent with the goals of the FTAIA. As the Solicitor General has explained, "[t]he FTAIA's focus is on *domestic effects* of anticompetitive conduct." Pet. App. 75a (emphasis added). Respondents' suggestion that conduct actionable in one case must be actionable in all cases—regardless of its territorial impact—is belied by the FTAIA's proviso, which states that, in the case of conduct affecting U.S. export commerce, the Sherman Act "shall apply to such conduct *only* for injury to export business in the United States." § 6a (emphasis added). Congress would not have disallowed recovery for certain injuries sustained in U.S. export commerce while simultaneously authorizing recovery for other foreign injuries lacking any connection at all to U.S. commerce.

Nor is respondents' reading necessary to avoid rendering the statute's proviso redundant. Opp. to Pet. 21. Even the court of appeals declined to accept that argument (Pet. App. 18a), and for good reason. Together, subsections (1)(B) and (2) permit a Sherman Act claim that arises from the requisite effect on U.S. export commerce "of a person engaged in such trade or commerce in the United States." The proviso adds an additional restriction. It limits such claims to ones based on "injury to export business in the United States" (emphasis added). Subsections (1)(B) and (2) thus require that an injury arise from an effect on a U.S. exporter, such as injury arising from the exclusion of an exporter from U.S. export commerce (possibly including injury to foreign purchasers of U.S. goods). The proviso, however, provides that such injuries are actionable only if inflicted on U.S. "export business in the United States" (and thus would preclude suits by foreign purchasers of U.S. exports). There is no redundancy. See *HeereMac*, 241 F.3d at 426 n.19 (rejecting redundancy argument).

It is respondents' construction that would deprive subsection (2) of any real operative effect. Subsection (1) codifies the basic "effects" test applied by U.S. courts since *Alcoa*, making clear that only a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce warrants the extraterritorial assertion of U.S. antitrust jurisdiction. Such an effect would, virtually by definition, give rise to "a claim" by *someone* in the United States. The additional requirement of subsection (2) would have no operative significance if, as respondents assert, it requires only that the effect on U.S. commerce is actionable by *someone*. Subsection (2), properly construed, performs the meaningful function of limiting the jurisdiction of the Sherman Act to claims that "arise from" the U.S. effects described in subsection (1). See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("every word" in statute should be given "some operative effect"); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Finally, respondents argue that petitioners' reading of the FTAIA would deny recovery to U.S. companies for injuries they sustain outside U.S. commerce and would likewise "immunize" U.S. companies from liability for misconduct abroad. Br. in Opp. 24 n.14. But that result is precisely the one sought by Congress in passing the FTAIA. Congress intended U.S. companies operating abroad to have the same remedies, and to be subject to the same rules, as their foreign counterparts. See, *infra*, pp. 32-33. The FTAIA makes clear that the Sherman Act does not address injuries arising from purely foreign transactions, including those involving U.S. sellers or buyers, that produce no injurious effects on U.S. commerce.

2. *Established principles governing the construction of federal statutes preclude the court of appeals' expansive reading of the FTAIA.*

a. ***Avoidance of international discord.*** The court of appeals' construction of the FTAIA conflicts with this Court's longstanding rule that federal legislation should be construed to avoid unreasonable interference with other nations' sovereign authority "if any other possible construction remains." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). In *Alcoa*, Judge Hand relied on that rule in concluding that the Sherman Act would not reach agreements limiting the supply of goods in foreign nations given "the international complications likely to arise from an effort in this country to treat [them] as unlawful." 148 F.2d at 443. The FTAIA's reference to "a claim" provides no "clearly expressed" intention (*McCulloch*, 372 U.S. at 22) to expand U.S. antitrust jurisdiction to claims that would undoubtedly cause international discord. See also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (requiring clear expression of congressional intent before giving law broad extraterritorial effect); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (same); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT (THIRD)") §§ 402, 403, 415 & Reporter's Note 3 (1987).

In *Hartford Fire*, this Court cited *Alcoa* and the RESTATEMENT (THIRD) in concluding that the Sherman Act applied to foreign conduct that was intended to, and did, cause substantial effects on the U.S. insurance market. 509 U.S. at 796. The Court explained that, because the defendants did not contest Sherman Act jurisdiction (*id.* at 795), and because in any event the plaintiffs' alleged injuries from harms to the U.S. economy fell well within the statute's established bounds (*id.* at 796), the only question was

whether a "true conflict" existed between U.S. and foreign law that made compliance with both impossible (*id.* at 798-99). Here, by contrast, the question is whether the Sherman Act permits suits by persons complaining of injuries sustained in transactions that were neither a part of (nor had any effect on) U.S. commerce.

Application of federal law to such transactions is presumptively unreasonable and contrary to Congress's intentions because the traditional "effects" justification for extraterritorial application of the Sherman Act is absent. See RESTATEMENT (THIRD) § 403(1) (nations are presumed not to legislate "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable"). It would be highly unreasonable to interpret federal law to govern activities that take place outside the United States, have little or no connection to the United States and are primarily of interest to other nations. *Id.*

Applying these principles, this Court has refused to construe federal law to apply to foreign activities where doing so would create "the possibility of international discord." *McCulloch*, 372 U.S. at 21-22. See also *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382-83 (1958) (relying on "the interacting interests of the United States and of foreign countries" to reject application of Jones Act to suits by foreign seamen on foreign vessels); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (looking to "prevalent doctrines of international law" in determining that Jones Act did not apply to foreign seamen on foreign vessels); RESTATEMENT (THIRD) § 403(2)(h). The Court did not view compliance with both sovereigns' laws as impossible in any of these cases. Rather, differences in sovereign policies regarding available remedies prompted the Court to construe the federal statutes as inapplicable.

Those same considerations are controlling here. Construing the FTAIA to regulate transactions in foreign countries that do not affect the United States would undoubtedly lead to conflict and resentment. Foreign competition laws differ significantly from U.S. law, both in substance and procedure. Although price-fixing is widely proscribed, other commercial activities that may be prohibited under U.S. law may be permissible under foreign law. Similarly, the treble damages remedy that is a fixture of U.S. antitrust law has generally not been adopted by foreign nations. Indeed, U.S. antitrust judgments awarding treble damages against foreign citizens are a particular source of resentment, and some foreign nations have enacted "blocking" and "clawback" statutes designed to discourage enforcement of U.S. treble damages judgments. See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST L. DEV. 1208-09 (5th ed. 2002) (noting foreign countries' concern over "the willingness of U.S. courts to enforce antitrust laws extraterritorially" and enactment of foreign blocking statutes); RESTATEMENT (THIRD) § 403(2)(g) (describing unreasonableness of regulating activity primarily of interest to foreign sovereign); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 251 (2001) (noting foreign sentiment that treble damages liability is "one of the most unacceptable aspects of U.S. regulatory law").[3]

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[3] See also Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 8(1) (1985) (Can.) (authorizing Attorney General to declare that certain antitrust judgments of foreign tribunals "not be recognized or enforceable") (*modified by* U.S.-Canada Agreement); Protection of Trading Interests Act, 1980, c. 11, § 6 (Eng.) (permitting defendants subject to multiple damages awards to "recover from the party in whose favour the judgment was given so much of the amount * * * as exceeds the part attributable to compensation"); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, pt. II div. 3, § 10(1) (Austl.) (*as amended*) (permitting Australian defendant in foreign antitrust proceeding to recoup

Sales of goods in foreign countries that do not themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting "parochial concept that all disputes must be resolved under our laws and in our courts"); RESTATEMENT (THIRD) § 403(2)(c); see also RESTATEMENT (THIRD) § 403(2)(a), (b) (regulation of foreign activities may be justified by nation's relationship either to location of, or to person principally responsible for, injury). Considerations of deterrence—the only U.S. interest identified by respondents or the court below—provide no basis for subjecting purely foreign transactions to federal law. See, *infra*, pp. 37-39. Rather, *foreign* laws regulate anticompetitive conduct in foreign countries. "Nearly 100 jurisdictions now have comprehensive antitrust laws," and "[n]early all" of these "now ban cartels either civilly or criminally." R. Hewitt Pate, *The DOJ International Antitrust Program—Maintaining the Momentum*, Speech Before the ABA Section of Antitrust Law, at 6, 8 (Feb. 6, 2003), available at http://www.usdoj.gov/atr/public/speeches/200736.pdf. Respondents have, indeed, asserted claims under the "competition laws of the relevant foreign nations" in addition to U.S. law (Am. Comp. ¶ 114 (J.A. 63)).[4]

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the entire "amount recovered pursuant to the foreign judgment" where certain conditions are met).

[4] See Trade Practices Act, 1974, cc. 4, 6, § 45(2)(a)(ii) (Austl.) (prohibiting anticompetitive conduct and providing for regulatory and private civil damages actions); Organic Law of Consumer Protection, arts. 51, 70, 87 R.O. No. 21 (2000) (Ecuador) (same); Panama Const. art. 290 & Law 29 of 1996, arts. 5, 11, 27 (Panama) (same); Law of Ukraine on the Protection of Economic Competition, arts. 6, 36, 50, 52, 55 (Jan. 11, 2001) (same); see also United Nations Conference on Trade and Development, *Competition Links: National Competition Authorities* (2000), at http://r0.unctad.org/en/subsites/cpolicy/english/nat-compaut.htm (last visited Jan. 30, 2004) (collecting foreign competition law for United Nations Conference on Trade and Development).

In keeping with these considerations, this Court has construed the Sherman Act to apply extraterritorially to address the *U.S. effects* of anticompetitive conduct, not its purely foreign effects. See, *supra*, pp. 11-13. The FTAIA contains no "clear expression" warranting a departure from these precedents, much less a construction that would override basic presumptions against applying U.S. law unreasonably to foreign activity.[5]

b. ***Avoidance of unintended adverse consequences.*** This Court also has required sensible constructions of federal legislation that avoid unworkable or impractical results not unambiguously required by the statute itself. See, *e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (rejecting construction of ERISA that would multiply federal claims and pose "a risk to the efficiency of federal courts"); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (rejecting construction of Airline Deregulation Act that would have unduly burdened federal courts). Significant adverse practical

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[5] As the Court recognized in *Hartford Fire*, in the case of the Sherman Act the concepts of subject matter jurisdiction and prescriptive jurisdiction may be coterminous. 509 U.S. at 796 n.22. Thus, while the FTAIA has been viewed as a constraint on the subject matter jurisdiction of federal courts (see *United Phosphorus Ltd. v. ANGUS Chem. Co.*, 322 F.3d 942, 950-51 (7th Cir. 2003), *petition for cert. denied* 72 U.S.L.W. 3327 (Nov. 10, 2003) (No. 03-203); see also, *e.g.*, H.R. Rep. No. 97-686 at 9 (statutory test applies at "jurisdictional stage"); *id.* at 13 (FTAIA governs "the subject matter jurisdiction of United States antitrust law")), the same outcome would obtain here if the FTAIA were instead viewed as a limitation on the prescriptive scope of the antitrust laws. As Justice Scalia explained for four dissenting Justices in *Hartford Fire*, lack of prescriptive jurisdiction requires "dismissal" for "failure to state a claim." 509 U.S. at 822. In this case, petitioners moved in the district court for dismissal both for lack of subject matter jurisdiction and for failure to state a claim. Pet. App. 45a.

consequences would flow from the D.C. Circuit's vast expansion of the extraterritorial scope of U.S. antitrust law.

The interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured "someone" in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions. See *Smith Kline & French Labs Ltd. v. Bloch*, 1 W.L.R. 730 (C.A. 1982) (Lord Denning) ("As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune"). As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with "increasing frequency." Pet. App. 73a. The decision by the court of appeals, if allowed to stand, would bring about a "sea change in the number and type of private actions permitted under the Sherman Act." *Id.* at 79a.

Congress cannot plausibly have intended to dedicate substantial federal resources to resolving purely foreign disputes that would otherwise have no place in U.S. courts. Nothing in the FTAIA's language or history suggests that Congress intended to make the federal district courts "world courts" for resolution of antitrust controversies. Absent such a clear direction, the "precious resources of United States courts" (*Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975)) are presumptively reserved for redressing injuries in this country. See, *e.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Bork, J.) (claims that foreign defendants defrauded foreign investors fell outside the subject matter jurisdiction of federal securities laws designed to

protect "American investors and markets"; it is "far from clear that [judicial] resources would be well spent" on such disputes).

In addition, litigating the novel claims authorized by the court of appeals would give rise to practical difficulties that make it inconceivable that Congress ever intended to permit such claims. This Court has rejected proposed interpretations of the antitrust laws that would require impractical or unduly burdensome litigation in the district courts. In *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481, 491-93 (1968), for example, it refused to permit a "pass on" defense that would turn antitrust trials into "long and complicated proceedings involving massive evidence and complicated theories." See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977); *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541-45 (1983) (stating that expansive antitrust standing would lead to "massive and complex damages litigation" that "not only burdens the courts, but also undermines the effectiveness of treble-damages suits"); see generally *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 274 (1992) (stating that "RICO's remedial purposes would more probably be hobbled than helped" by expansive construction of RICO private right of action).

The court of appeals' ruling that a litigant asserting a claim based on injury in foreign commerce must first show, as a prerequisite to asserting its own claim, "a claim" on the part of someone else arising from effects on U.S. commerce (Pet. App. 23a) presents an array of complex practical questions for which the statute supplies no answers. How would a foreign plaintiff establish that some other person has "a claim"—not just in price-fixing cases but in *any* case brought under the Sherman Act? Such a hypothetical "claim," of course, must actually have merit; Congress cannot have intended the FTAIA to require only an empty exercise in

pleading. Nor is it plausible that Congress wanted a preliminary merits inquiry on a non-party claim to decide whether the claim of the plaintiff may proceed. See generally *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003) ("[J]urisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset").

Under the court of appeals' ruling, a plaintiff also would need to prove that the *same* "conduct" that caused its foreign injury also caused the domestic injury (as respondents seek to do here by alleging a "global conspiracy"). This would require courts to answer the complex (indeed, metaphysical) question whether certain actions that affect the United States and other actions that affect foreign markets should be considered the "same conduct," and in particular whether agreements directed at different countries constitute multiple narrow conspiracies or one broad conspiracy. See generally *United States v. Nevils*, 897 F.2d 300, 306 (8th Cir. 1990) (noting "difficult task of distinguishing between single and multiple conspiracies"). This fact-intensive inquiry would require extensive proceedings on threshold issues. Further, where the challenged restraint is not a "per se" violation, such as price fixing, determining whether an antitrust "claim" exists would typically require a complex "rule of reason" analysis, including an assessment of the relevant U.S. market, *before* assessing the foreign market in which the plaintiff was injured. It defies belief that Congress intended to engender threshold proceedings of this nature merely by using the word "a" in subsection (2).

c. ***Avoidance of constitutional problems.*** Yet another reason to reject the court of appeals' construction of the FTAIA is that it would raise serious constitutional questions. Statutes should be construed to avoid such constitutional

difficulties whenever possible. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001).[6]

As the Fifth Circuit noted in *HeereMac*, 241 F.3d at 426 n.18, application of U.S. antitrust law to purely foreign transactions that do not affect U.S. commerce might well fall outside Congress's power to regulate commerce "*with* foreign Nations, and among the several States." U.S. Const. art. I, § 8[3] (emphasis added). The Constitution's grant of legislative authority does not include power to regulate commerce *within* or *among* foreign nations. Yet such purely foreign commerce is the *only* commerce implicated by respondents' vitamin purchases.

The decision below effectively construed the FTAIA to confer on purely foreign purchasers a claim against purely foreign sellers for transactions consummated entirely within or between foreign countries, even where (as here) those transactions had no effect on U.S. commerce. The court of appeals would have U.S. law dictate petitioners' liability for the effects of their alleged misconduct not only on persons participating in U.S. commerce but also on all others worldwide. Congress's Commerce Clause authority for such an extraordinary legislative prescription is doubtful. Even if the FTAIA's textual meaning were less than plain, the court of appeals should have construed the FTAIA to avoid this question of the constitutional limits on Congress's power.

Application of U.S. law to purely foreign transactions also would raise serious constitutional concerns under the Due Process Clause. The same factors that determine whether

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[6] The D.C. Circuit addressed this question by stating that petitioners had conceded that the vitamin cartel produced substantial effects in the United States, which Congress may regulate. Pet. App. 9a. But acknowledging that Congress may regulate the U.S. effects of conspiratorial conduct does not answer the question whether it can regulate the purely foreign effects of that conduct.

application of the law of a given state to a particular person or activity comports with due process—contacts with the state, the state's interests arising from those contacts and the fairness of applying the state's law in the context of a particular case—should apply to extraterritorial assertions of federal law. See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223, 1240-42 (1992) (arguing that Fifth Amendment's Due Process Clause "limits extraterritorial application of substantive federal law") (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819-22 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930)); see also 1A AREEDA ET AL., ANTITRUST LAW ¶ 273c4 n.25 (2003 Supp.) (FTAIA should not be interpreted "in such a way as to impute to Congress a wish to apply United States law to a transaction whose relation to the United States is so minimal"). Respondents' vitamin purchases in Australia, Ecuador, Panama and Ukraine were purely foreign transactions that lacked any connection to the United States, much less "significant contacts."

These daunting constitutional problems should be avoided by rejecting the construction of the FTAIA adopted by the D.C. Circuit.

3. *The historical context and legislative history confirm the restrictive purpose of the FTAIA.*

The historical context of the FTAIA also refutes the expansive interpretation adopted by the court of appeals. As the Solicitor General noted below, the FTAIA "was prompted in significant part by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions." Pet. App. 76a (emphasis added). See also *Hartford Fire*, 509 U.S. at 796 n.23 ("The FTAIA was intended to exempt from the Sherman Act export transactions

that did not injure the *United States economy*") (emphasis added). This historical context reinforces the limiting purpose evident in the FTAIA's text. See *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (plain meaning of statute was "reinforced by [its] history").

As of the FTAIA's enactment, no court had ever held that injuries resulting from the effects of anticompetitive conduct on purely foreign commerce were actionable under U.S. antitrust law. See, *supra*, pp. 13-14. The House Judiciary Committee Report accompanying the FTAIA noted, however, that certain recent court decisions reflected "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R. Rep. No. 97-686, at 5. The Report cited three district court decisions that, using "different formulations of the nature and quantum of 'effects' needed," had permitted foreign plaintiffs to assert claims for injuries sustained abroad as a result of restrictions on exports of goods or services from the United States. *Id.*[7]

Those decisions seemingly departed from the longstanding view of leading treatises and commentators that "the Sherman

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[7] See *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) (suit by Bahamian beer distributor against U.S. beer supplier alleging injuries from restraints on U.S. wholesalers which "directly affected the flow of commerce out of this country" to the Bahamas); *Waldbaum v. Worldvision Enters., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. Nov. 22, 1978) (foreign purchaser of U.S. film licenses for South African market alleged that defendant's tying practices restrained competition in U.S. export market, which injured plaintiff as purchaser in that market); *Industria Siciliani Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. Jan. 18, 1977) (foreign purchaser of U.S. design and engineering services alleged injury as result of "defendants' actions in minimizing domestic [*i.e.*, U.S.] competition in the sale of certain engineering services" with result that "trade in the export of [such] services was restrained").

Act itself has no business" reaching transactions with "solely foreign effects." KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 352 (1958). See also, *e.g.*, Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 CORNELL INT'L L.J. 16, 41 (1974) (former Assistant Attorney General in charge of Antitrust Division from 1976 to 1977 stating that "we should expect that other nations and communities will use *their* antitrust laws to protect *their* consumers against those who restrain competition in *their* markets") (emphasis in original); THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 79 (1955) ("The Sherman Act is not, of course, intended to protect foreign consumers against monopoly in their home markets"). An opposing minority view held that foreign plaintiffs should be entitled to sue for injuries sustained abroad as a result of restraints affecting U.S. exports, because U.S. exports are a component (along with U.S. imports) of the "commerce with foreign nations" regulated by the Sherman Act. See, *e.g.*, James Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1, 6-7 (1974). Even advocates of this position did not contend, however, that foreign plaintiffs could recover for injuries sustained in purely foreign transactions that themselves had no substantial effect on U.S. commerce. See *id.* at 6.

Congress enacted the FTAIA against this backdrop to enhance U.S. export competitiveness by easing concerns of U.S. businesses about U.S. antitrust scrutiny of "their conduct which primarily affects foreign, rather than domestic markets." Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Comm. on the Judiciary, 97th Cong. 1 (1981) ("S. Hearings on S.795") (statement of Chairman Thurmond). Congress sought to ensure a level playing field so that U.S. firms could engage in U.S. exports and purely foreign activity without concerns about federal

antitrust law, subject only to restrictions imposed by foreign nations. H.R. Rep. No. 97-686 at 2-4, 7-8.

Congress intended the FTAIA's jurisdictional test to be a "straightforward clarification of existing American law." *Id.* at 2. The House Report noted that, since *Alcoa*, "it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies." *Id.* at 5. As explained by the Chairman of the Senate Judiciary Committee, Congress intended to require a "threshold" jurisdictional determination that the alleged violation had "the requisite direct and substantial effect on commerce in this country." S. Hearings on S.795 at 1, 2 (statement of Chairman Thurmond).

Congress's focus was not limited to U.S. export commerce. "[W]holly foreign transactions as well as export transactions," it explained, "are covered by the amendment," thereby excluding from antitrust scrutiny "transactions within, between, or among other nations" that do not have "a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor." H.R. Rep. 97-686 at 9-10. See also *id.* ("H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation").

Significantly, the legislative history repeatedly identifies the location of individual "transactions" as the controlling consideration for jurisdiction, not the nationality of the victim or the alleged violator. Congress stated that "purely foreign transactions" would be excluded from U.S. antitrust jurisdiction if those *transactions* did not have a direct, substantial and foreseeable effect on U.S. commerce. *Id.* 9-10 ("[A] transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws"). Nowhere did Congress endorse suits complaining of

"global conspiracies" on behalf of persons injured in foreign transactions that do not themselves affect U.S. commerce.

Congress's exclusion of foreign transactions from the reach of the Sherman Act was grounded on respect for the sovereignty of foreign nations. As the Chairman of the House Judiciary Committee noted, the legislation sought to mollify "our closest allies and trading partners [who] resent the extraterritorial reach of our antitrust laws." *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2826 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong. 1 (1981) (statement of Chairman Rodino). The "domestic effects standard" was intended to "limit the reach of our antitrust laws in a manner consistent with our major trading partners." *Id.* at 2. See also *id.* at 92 (statement of James R. Atwood) ("By making clear that effects in foreign markets are the domain of foreign rather than American law, H.R. 2326 would put American practice in a more rational and diplomatically defensible mode. No other country attempts to regulate effects in foreign markets through the enforcement of its own antitrust law").

Although the court of appeals claimed that the legislative record supports its expansive interpretation, Judge Henderson and the Fifth Circuit correctly concluded that the opposite is true. Pet. App. 40a; *HeereMac*, 241 F.3d at 428-29. As the Solicitor General has noted, "there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods." Pet. App. 76a. To the contrary, the House Report explains that subsection (2) of the statute was added "to require that the 'effect' providing the jurisdictional nexus"—*i.e.*, the "direct, substantial, and reasonably foreseeable" effect on U.S. commerce required by subsection (1)—"must also be *the basis for the injury alleged*." H.R. Rep. No. 97-686, at 11-12 (emphasis added). Congress's emphasis on the "nexus" between a U.S. commercial effect and "the injury alleged" demonstrates Congress's purpose to restrict Sherman Act litigation to claims complaining of injury sustained in U.S. commerce. Indeed, the House Report repeatedly refers to antitrust protections enjoyed by foreign purchasers "*in the domestic marketplace*." *Id.* at 10 (emphasis added).

The D.C. Circuit focused on a statement in the House Report that "the impact of the illegal conduct" need not "be experienced by the injured party *within* the United States." Pet. App. 24a-25a (emphasis added). That statement merely reiterates established law that injuries sustained abroad may be recoverable under U.S. antitrust law if the plaintiff was harmed while doing business in U.S. commerce. See, *e.g.*, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 816-17 (D.C. Cir. 1968) (injuries sustained by American companies as result of exclusion from federally financed ocean shipping between foreign countries were actionable, although sustained overseas, because such shipping constituted U.S. commerce). It does not authorize an antitrust claim where the party's injury does not arise from an effect on *U.S. commerce*.

Following enactment of the FTAIA, scholars and enforcement officials understood the amendment to preclude recovery for foreign injury. James Atwood, a leading expert whose views were cited repeatedly in the House Report on the FTAIA, noted: "In the 1982 statute, Congress tried to convey the following basic message (one to which the Justice Department has already subscribed): *The U.S. antitrust laws exist for the protection of American and not foreign interests*." James R. Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 LAW & CONTEMP. PROB. 153, 155 (1987) (emphasis added). See also David Gill, *Review of Antitrust and American Business Abroad*, 77 AM. J. INT'L L. 679, 681 (1983) ("Atwood's suggestion that foreign consumers need not be protected by

the U.S. antitrust laws has been largely enacted into law"); accord John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORD. CORP. L. INST. 350, 364 (1983) (former head of the Antitrust Division stating that "[t]he debate among antitrust commentators concerning subject matter jurisdiction over conduct affecting wholly foreign commerce is resolved in favor of denying jurisdiction"); Wilbur L. Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANSNAT'L L. 673, 705 (1982) (FTAIA "makes clear that trade between third countries is not covered by the Sherman Act").

Treatises repeatedly cite the FTAIA to show that U.S. antitrust law does not protect international competition for its own sake and denies recovery for foreign injury. See MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 52 (2d ed. 2001) ("Antitrust injury suffered in foreign markets is excluded from the scope of the Sherman and Federal Trade Commission Acts unless it involves injury to a U.S. exporter"); 1 Barry E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 555 (Supp. 1993) (the FTAIA "expressly precludes recovery for injuries suffered in foreign markets," a limitation that "applies to all plaintiffs—foreign governments, foreign private firms and U.S. firms doing business abroad"); *id.* at 182.3 (Supp. 1996-1) (FTAIA limits jurisdiction and standing "to exclude claims for [injuries] incurred only in foreign markets").

This historical record, like the text of the statute itself, demonstrates that the fundamental objective of the FTAIA was to restrict, not enlarge, the extraterritorial application of U.S. antitrust law. The D.C. Circuit's reading of the statute is directly contrary to that purpose.

C. The Deterrence Rationale Invoked by the Court of Appeals Cannot Justify its Ruling.

The court of appeals based its sweeping interpretation of the FTAIA on its own policy judgment that its construction was "necessary to protect U.S. commerce from global conspiracies." Pet. App. 32a. In the court's view, without the threat of liability to all their victims, wherever located, antitrust violators would not be adequately deterred from conduct that harms the United States. *Id.* That judgment is unsupported by any law or precedent of this Court and has been criticized by the very federal agencies responsible for antitrust enforcement.

The court of appeals claimed that its expansive reading of the FTAIA was supported by "policies of deterrence" that it viewed as "emanating" from this Court's decision in *Pfizer*. Pet. App. 4a, 30a-33a. But nothing in *Pfizer* supports the D.C. Circuit's virtually limitless view of U.S. antitrust jurisdiction. *Pfizer* simply held that a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 320. While the Court noted that its ruling would advance deterrence, it never suggested that U.S. antitrust law provides a remedy for injuries sustained outside U.S. commerce or that deterrence considerations would justify extending the private remedy conferred by the Clayton Act to injuries sustained in purely foreign transactions. To the contrary, the Court expressly stated that U.S. antitrust law should protect a foreign government that "enters *our commercial markets*" (*id.* at 318) (emphasis added)—not purchasers of goods in foreign nations. See Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws*, 56 SMU L. REV. 2151, 2185-86 (2003) ("*Foreign Transactions*") ("*Pfizer* provides no support for the expansion of subject matter jurisdiction under the FTAIA").

Nor did the court of appeals consider existing deterrents. Congress has steadily increased the criminal penalties that

may be imposed on corporations for violations of the Sherman Act from $50,000 (prior to 1974) to $10,000,000 today. Actual penalties substantially exceed these amounts as a result of other provisions of the criminal code that authorize fines based on twice the corporation's pecuniary gain from price fixing or twice the victim's loss. See 18 U.S.C. § 3571. This provision has resulted in payment of a $500 million federal criminal penalty by one of the petitioners in this case, which remains the largest criminal fine ever obtained by the Department of Justice. Pet. App. 68a. These criminal fine provisions, together with the Clayton Act's authorization of treble damages and attorneys' fees, result in an aggregate exposure for antitrust violators under federal law alone of more than five times the economic harms resulting from the U.S. effects of their misconduct. The court of appeals did not mention the deterrent effect of these criminal sanctions (or the fines and prison terms imposed on individuals personally, see, *supra*, p. 4) in reaching its decision.

The court of appeals also failed to consider the additional deterrent effects not only of civil damages claims under state laws that permit suits by state attorneys general and indirect purchasers but also of civil claims under foreign laws and foreign governmental enforcement proceedings. Petitioners have collectively paid more than $1 billion in fines to foreign antitrust enforcers for alleged cartel activity in the vitamins industry. Pet. App. 68a. See also, *supra*, pp. 23-24 & n.3 (discussing foreign prohibitions on anticompetitive conduct).

Finally, the federal agencies charged with enforcing the antitrust laws have warned that the decision below will weaken, rather than enhance, deterrence. As the Solicitor General explained below, imposing treble damages liability for worldwide sales will discourage antitrust violators from disclosing criminal conduct under programs in the United States and other jurisdictions that provide amnesty from criminal prosecution. Pet. App. 78a-79a. According to the

government, these amnesty programs are "the number one source of leads for breaking up international cartels." *Id.* at 78a. They also play a substantial role in deterring violations because, by making cooperation attractive, they increase the probability that illegal practices will eventually be detected. *Id.* at 79a. The significant increase in liability that would result from permitting U.S. treble damages claims for all harms sustained worldwide—liability that would be invited by disclosing criminal wrongdoing—would undoubtedly dissuade many potential cooperators from coming forward. The court of appeals' policy judgment as to how best to deter antitrust violations is refuted by the expert assessment of the U.S. antitrust enforcement agencies. See *id.* at 78a-79a; see also Cavanagh, *Foreign Transactions*, at 2185 (court's ruling would "mak[e] it more difficult for the Antitrust Division to prosecute violations and more difficult for private plaintiffs to sue"). The court of appeals should not have promoted global compensation at the expense of government investigation and enforcement.

D. Respondents' "Global Conspiracy" Allegations Do Not Bring Their Claims Within the Scope of the Sherman Act.

Respondents cannot save their claims by arguing that their injuries "arise from" an effect on U.S. commerce, purportedly because they were caused by a "global conspiracy" that affected commerce both in the United States and in foreign countries. This Court's precedents, as well as the text of the FTAIA, foreclose that effort to fabricate a U.S. injury out of a purely foreign one.

This Court has previously rejected attempts by plaintiffs seeking to link anticompetitive acts in the U.S. and in foreign markets by alleging "one big conspiracy." In *Matsushita*, U.S. television manufacturers alleged that price-fixing activity in a foreign market was part of a larger, international conspiracy that included predatory pricing in the United States. 475 U.S.

at 584 n.7. This Court refused to accept allegations of "one large conspiracy" as a pretext for considering foreign market effects that did not cause injuries in U.S. commerce. *Id.*

Relying on *Matsushita*, the Fifth Circuit in *HeereMac* rejected precisely the same global conspiracy argument made by respondents here. There the plaintiff, a foreign oil company, sought to recover payments for barge services in foreign waters by alleging that its injuries resulted from a "worldwide" conspiracy to control a "single, unified, global market" for barge services. 241 F.3d at 425. The Fifth Circuit rejected the plaintiff's claim that its injuries "arose from" the effect of the conspiracy on the market for barge services in the United States. It was not enough, the court held, to show "a connection and an interrelatedness" between the high prices plaintiff paid and high prices paid by others for the same services in the United States. *HeereMac*, 241 F.3d at 427. As the Solicitor General noted below, "[t]he FTAIA's focus is on domestic *effects* of anticompetitive conduct," and not just on that conduct itself. Pet. App. 75a (emphasis added).

Respondents' claims arise only from effects felt in foreign commerce. Respondents cannot conflate those foreign effects with other U.S. effects giving rise to claims by different persons. Congress sought to apply U.S. law to particular *transactions* having the requisite U.S. effects and to exclude "wholly foreign transactions" from the scope of federal antitrust jurisdiction. See, *supra*, pp. 33-34; *Hartford Fire*, 509 U.S. at 796 n.23 (FTAIA exempts "export transactions that did not injure the United States economy"); *HeereMac*, 241 F.3d at 426 ("[T]he relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants").

Respondents also argued in their opposition to the petition for certiorari that vitamin prices in the United States served as

a "benchmark" for prices worldwide. Br. in Opp. 2-3. This variant of their "global conspiracy" allegation does not appear in their complaint (see J.A. 6) and, in any event, has no legal significance. The FTAIA limits U.S. antitrust jurisdiction to claims arising from the "direct, substantial, and reasonably foreseeable" U.S. effects of anticompetitive conduct. No such effect gave rise to respondents' claims; they were not injured by overcharges paid by others in U.S. commerce. Their claims arise from injuries they themselves sustained by paying overcharges in Australia, Ukraine, Ecuador and Panama. The prices of vitamins in foreign countries would at best be indirect and remote results of the fixing of prices in the United States. That connection is insufficient to bring respondents' claims within the scope of U.S. antitrust law. See generally *Associated General*, 459 U.S. at 531-32.

Respondents' assertions of a "global conspiracy" and "benchmark pricing" are unavailing because they do not alter the fact that respondents' injuries arise from a foreign, not a U.S., effect. If a foreign plaintiff who was injured in a purely foreign transaction could assert a claim under the Sherman Act simply by alleging a "global conspiracy" or a relationship between U.S. and foreign prices, the federal courts would become "world courts" swamped with imported claims lacking any "cognizable U.S. interests." Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement*, Speech Before the ABA Section of Antitrust Law (Nov. 18, 2003), at 11, available at http://www.usdoj.gov/atr/public/speeches/201509.htm. With no direct statutory language so providing, Congress cannot reasonably be thought to have intended that result. To the contrary, it wanted U.S. antitrust sanctions to be used for the protection of "the domestic marketplace," not foreign economies. H.R. Rep. No. 97-686 at 10.

II. THE PRIVATE DAMAGES REMEDY CONFERRED BY SECTION 4 OF THE CLAYTON ACT DOES NOT PERMIT RECOVERY FOR INJURIES SUSTAINED IN PURELY FOREIGN TRANSACTIONS.

Even if this Court were to conclude that the jurisdictional bar of the FTAIA is inapplicable in this case, respondents nevertheless lack standing to bring a claim under the Clayton Act. The Clayton Act does not confer an abstract right to pursue conspiracies. While the government has broad Sherman Act authority to "prevent and restrain" antitrust violations (15 U.S.C. § 4), a private party may sue under the Clayton Act only to redress its own injury. Standing in private damages actions is strictly limited based on principles similar to those applied in common law tort actions (*Associated General*, 459 U.S. at 532-36), and each plaintiff must show causation and cognizable antitrust injury to itself. See *id.* at 532-33; 2 AREEDA ET AL., ANTITRUST LAW ¶ 353. The FTAIA did not amend the Clayton Act; indeed, Congress made clear that it did "not intend to alter existing concepts of antitrust injury or antitrust standing." H.R. Rep. No. 97-686, at 11.

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor * * *." 15 U.S.C. § 15. Respondents have alleged a violation of Section 1 of the Sherman Act, which prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." § 1. Respondents' own injuries were not caused "by reason of" an agreement in restraint of commerce "among" the several states or "with" foreign nations, because their injuries are not a direct consequence of any impairment of competition in U.S. commerce. Foreign effects that do not result from diminished U.S. competition are not actionable under the

Clayton Act. See *Matsushita*, 475 U.S. at 584 n.7 (private plaintiffs challenging multinational conspiracy can seek redress only for injuries that occur "in the American market"); see also 15 U.S.C. § 26 (right to injunctive relief requires "threatened loss or damage *by* a violation of the antitrust laws") (emphasis added).

This interpretation of Section 4 is also compelled by the rule, discussed above (see, *supra*, pp. 21-25), that federal statutes should be construed so as to avoid unreasonable application of U.S. law to foreign activity. Interpreting the Clayton Act to permit respondents to recover for injuries sustained in purely foreign transactions would unreasonably interfere with foreign nations' interests in having their own policies regarding private plaintiff suits apply to transactions within their own economies.

Standing principles developed in the antitrust context confirm this result. The Court has explained that Section 4 requires a plaintiff to show "antitrust injury" in order to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). Congress did not intend "to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General*, 459 U.S. at 534. Accordingly, to be actionable, a plaintiff's injury must be "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). The antitrust laws were designed to prevent injuries to American markets and American consumers, as well as to foreign persons that "enter[] our commercial markets." *Pfizer*, 434 U.S. at 318; *supra*, p. 37. They were *not* designed to prevent injuries sustained in foreign transactions affected by breakdowns in competition outside U.S. commerce. Similarly, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977),

this Court stated that, to be actionable under the Clayton Act, a plaintiff's injury must "flow from that which makes defendants' acts unlawful." A contrary result, the Court explained, would "divorce[] antitrust recovery from the purposes of the antitrust laws." *Id.* at 487. Because an effect on U.S. commerce is necessary for foreign conduct to be unlawful under the Sherman Act (see, *supra*, pp. 11-14), it follows, under *Brunswick*, that only injuries that "flow from" those U.S. effects are actionable.

The antitrust standing inquiry also considers the practical effects of permitting the plaintiff to assert an antitrust claim. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. ___, No. 02-682, 72 U.S.L.W. 4114, slip op. at 2 (Jan. 13, 2004) ("Denying a remedy * * * will serve the strong interest 'in keeping the scope of complex antitrust trials within judicially manageable limits'" (quoting *Associated General*, 459 U.S. at 543)) (Stevens, J., concurring in judgment). Allowing respondents' claims—and those of innumerable similarly situated foreign plaintiffs that would inexorably follow—will adversely affect the administration of justice in heavily burdened federal courts. See, *supra*, pp. 25-27; see generally *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 266, 274 (1992) (noting "unlikelihood" that Congress intended RICO private action modeled on Section 4 of the Clayton Act to provide a remedy for all injuries and expressing concern that contrary result would impair statute's remedial purpose); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747-48 (1975) ("[T]he inexorable broadening of the class of plaintiffs who may sue in this area of the law will ultimately result in more harm than good").

This Court relied on antitrust standing principles in *Matsushita* to reject arguments by U.S. television manufacturers that Japanese competitors had engaged in price-fixing conduct in the Japanese market as part of "one large

conspiracy" that included attempts to monopolize the U.S. market. 475 U.S. at 584 n.7. The alleged harms to Japanese commerce, the Court stated, could not cause "an injury for which the antitrust laws provide relief." *Id.* See also *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 307 (3d Cir. 2002) (holding that injuries occurring "exclusively in foreign markets * * * are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act"); 2 SPENCER W. WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD ¶ 13.22 (3d ed. 2002) ("[P]laintiffs who are complaining of restraints they feel in foreign markets" do "not have the right to invoke American antitrust remedies"). Those principles are controlling here and require dismissal of a complaint that does not "fall within 'the zone of interests to be protected or regulated by the statute.'" *Valley Forge*, 454 U.S. at 475. See also 1A AREEDA ET AL., ¶ 272h ("[T]he concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers") (emphasis in original).

These conclusions, which independently require the dismissal of respondents' claims, also reinforce the correct interpretation of the FTAIA. As the Solicitor General has noted, the FTAIA "incorporate[s]" concepts of antitrust injury and standing (Pet. App. 75a) by requiring that only injuries that result from an anticompetitive effect on U.S. commerce can support a claim. Subsection (1) of the FTAIA makes indisputably clear that "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce is necessary for foreign conduct to be unlawful, and subsection (2), by expressly requiring that a claim must "arise from" a U.S. effect, incorporates *Brunswick*'s requirement that a plaintiff's injury "flow from" that which makes the defendant's conduct unlawful—*i.e.*, its effect on U.S. commerce.

To reject that conclusion, as the court below did, is to read the FTAIA as an affirmative grant of standing to persons injured in foreign commerce even though their injuries do not

flow from any U.S. effect. It turns the FTAIA into a silent partial repeal of basic standing principles—for the benefit of foreign plaintiffs. Subsection (2) cannot reasonably be interpreted as having effected so dramatic a departure from existing law, which Congress specifically disclaimed any intent to change.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (1982), codified at 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(22)

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Petitioners,

v.

Empagran, S.A., et al.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the Foreign Trade Antitrust Improvements Act narrows the Sherman Act's application over the claims of foreign purchasers of a worldwide cartel that has direct, substantial, and foreseeable effects on U.S. commerce.

2. Whether overseas purchasers of a worldwide cartel that is prohibited by the antitrust laws have suffered "antitrust injury" and have "antitrust standing."

RULE 29.6 STATEMENT

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

Brisbane Export Corp. was a respondent at the certiorari stage but has since withdrawn from the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
BRIEF FOR THE RESPONDENTS 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT 5
I. Because Global Cartels' Domestic And Foreign Effects Are Inextricably Intertwined, Respondents Prevail Even Under Petitioners' Construction of The FTAIA And Foreign Plaintiffs' Claims Against Such Cartels Furthermore Directly Advance U.S. Interests. 9
A. The Market for Bulk Vitamins Is a Global Market. ... 10
B. The Effects Of Petitioners' Conduct On U.S. Commerce Gave Rise To Respondents' Claims. 11
C. U.S. Interests Are Directly Advanced By Recognizing The Claims Of All Victims Of An Integrated Cartel That Operates In The United States. 13
II. The FTAIA's Jurisdictional Limitation Does Not Apply To Conduct Involving Import Commerce And Thus Does Not Apply To Worldwide Cartels. 19
A. The FTAIA Limits The Scope Of The Sherman Act Solely In Cases Involving Only U.S. Export Commerce. 19
B. The Authorities Cited By Petitioners Actually Support *Respondents'* Reading Of The FTAIA. 23
III. Congress Inserted Clause 2 Merely To Ensure That The Covered Foreign Conduct Must Have An *Anti-Competitive* Impact On Domestic Commerce To Be Actionable Under The Sherman Act. 25

A. The Drafting History, Text, And Structure Of The FTAIA Confirm Congress's Intent To Adopt The *National Bank of Canada* Rule.....27

B. The House Report On Which Petitioners Rely Confirms That Congress Intended To Preserve The Claims Of Overseas Purchasers.....31

IV. As Direct Victims Of Petitioners' Worldwide Cartel, Respondents Have Suffered "Antitrust Injury" And Have "Antitrust Standing." 35

A. Respondents Have Antitrust Standing Even Under Petitioners' Proposed Standards. 36

B. Petitioners' Proposed Standing Rule Is Inconsistent With This Court's Precedents And Congress's Intent. 37

1. Respondents Satisfy The Settled Requirements For Antitrust Standing.....37

2. Congress Declined To Adopt The Restriction On Standing That Petitioners Propose. 41

V. The Other Arguments Of Petitioners' *Amici* Lack Merit. 44

A. The Government's Leniency Program Is Not A Justification for Misinterpreting the FTAIA.....44

B. The Exercise Of Jurisdiction Over A Worldwide Cartel Does Not Offend Comity. 47

CONCLUSION.....50

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Atl. Richfield Co. v. *USA Petro. Co.*, 495 U.S. 328 (1990).....37

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Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 47

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15 U.S.C. 1 37
15 U.S.C. 15(a) 2, 35
15 U.S.C. 15(b) 30, 43
Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, codified at
15 U.S.C. 6a ..... passim
15 U.S.C. 6a(1) 29, 30, 34
15 U.S.C. 6a(1)(A) 21
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proviso 4, 20, 21, 23, 29, 30, 43

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Provimi v. *Aventis Animal Nutrition SA*, [2003] E.C.C. 29.....50

Other

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BRIEF FOR THE RESPONDENTS

Respondents Empagran, S.A., et al., respectfully request that the judgment of the United States Court of Appeals for the D.C. Circuit be affirmed.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix, *infra*, at 1a-2a.

STATEMENT OF THE CASE

1. Petitioners are more than twenty U.S. vitamin producers and distributors and their foreign affiliated companies. J.A. 19-33. Together, they perpetrated "the most pervasive and harmful criminal antitrust conspiracy ever uncovered." Joel I. Klein, Ass't A.G., Speech of Sept. 30, 1999, at 5.[1] This conspiracy – which petitioners named "Vitamins, Inc." – was a "textbook example" of a worldwide cartel. Gary R. Spratling, Dep. Ass't A.G., Speech of Dec. 9, 1999, at 13. By allocating geographic markets amongst themselves and fixing prices, petitioners successfully eliminated competition in the sale of bulk vitamins, reaching agreements "on everything from how much product each company would produce, which customers they would sell it to, and at what price they would sell it." *Ibid.*

The U.S. government's prosecution of petitioners was the crowning achievement of its aggressive pursuit of international cartels in the mid-1990s. Contrary to petitioners' claim that they were charged with "fixing prices of vitamins sold in the United States" (Br. 4), in fact, they were prosecuted here for their "*worldwide* conspiracy to raise and fix prices and allocate market shares for certain vitamins sold in the United States *and elsewhere*" (U.S. D.O.J., Press Release, Department of Justice, F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999) (emphases added)). Petitioners were indicted for, and

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[1] The Table of Authorities provides detailed information on where this and other government speeches are available.

pled guilty to, "a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of certain vitamins manufactured and sold in the United States *and elsewhere*." Plea Agreement, *United States* v. *F. Hoffmann-La Roche, Ltd.*, No. 3:99-CR-00184 (May 20, 1999).

This suit was filed against petitioners by Procter & Gamble (a U.S. corporation), six of its U.S. and foreign affiliated companies, and foreign companies (respondents here), all of which purchased bulk vitamins "for delivery outside the United States" during the period of the cartel. J.A. 17-19, 58.[2] They sued petitioners in the District Court for the District of Columbia under, *inter alia*, Section 4 of the Clayton Act, which confers a private right of action upon persons "injured in [their] business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). The complaint was designated a companion case to ongoing litigation brought by persons who purchased bulk vitamins for delivery in this country.

2. Petitioners moved to dismiss. Notably, they did not invoke doctrines such as comity, conflict of laws, or *forum non conveniens* to show that, assuming jurisdiction exists, the courts should decline to *exercise* that jurisdiction. Instead, they contended that (i) the complaint was subject to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. 6a) and was barred by FTAIA Clause 2's requirement that the effect of the defendants' conduct on U.S. commerce "give rise to a claim under" the Sherman Act; and (ii) respondents lacked standing. The district court agreed with the former contention and did not reach the latter. Pet. App. 48a-52a.

The D.C. Circuit reversed. Pet. App. 1a-39a. The court agreed with the Second Circuit and Judge Patrick Higginbotham (dissenting in the Fifth Circuit) that Clause 2 does not require that "the plaintiff's claim" arise from the effect of the defendants' conduct on U.S. commerce. See Pet. App. 17a-20a. It therefore did not reach respondents' contention that the adverse

[2] The claims of the Procter & Gamble parties have been held in abeyance during this appeal. J.A. 69.

effect of petitioners' cartel on U.S. commerce did, in fact, give rise to their claims. *Id.* 3a. The court also concluded that respondents have standing to sue. *Id.* 33a-37a.

SUMMARY OF THE ARGUMENT

In enacting the FTAIA, Congress acted against the backdrop of long-settled precedents applying the Sherman Act. A line of this Court's decisions dating back to *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), holds that the Sherman Act bars anti-competitive conspiracies with substantial effects on U.S. commerce, and furthermore extends to the activities here *and abroad* in furtherance of such conspiracies. Petitioners' cartel was illegal under this settled law.

The "effects test" rests on the recognition that the United States may be seriously harmed by anti-competitive activities abroad. And, as this Court concluded in *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 315 (1978), absent liability to foreign plaintiffs, the perpetrators of a global conspiracy will use their profits abroad to compensate for the risk of punishment in this country. Bulk vitamins, in particular, are traded freely between geographic regions; in a competitive market, purchasers will buy wherever prices are lowest. There is therefore no "U.S. market" for bulk vitamins, but instead a global market.

In light of the foregoing, jurisdiction exists in this case for three independent reasons. First, even if petitioners' interpretation of the FTAIA were correct, respondents would satisfy it. Petitioners argue that in the FTAIA Congress excluded conduct affecting U.S. commerce from the Sherman Act unless those U.S. effects "give rise to" the plaintiff's claim. But the effect of petitioners' cartel on U.S. commerce *did* "give rise to" respondents' injuries. Petitioners stopped overseas purchasers such as respondents from buying bulk vitamins here, or from intermediaries who purchased here. Furthermore, had competitive conditions existed in this country, the cartel would have collapsed everywhere as a result of arbitrage.

Second, the FTAIA does not restrict the antitrust laws' application to global cartels. That statute defines the scope of the Sherman Act – *i.e.*, the conduct that the Sherman Act prohibits –

rather than the standing of private parties to sue. And it limits the Sherman Act *only* with respect to foreign commerce "other than import trade or import commerce" (15 U.S.C. 6a); likewise, its proviso limiting standing applies solely to conduct that only affects U.S. export commerce (*id.*, proviso)). The FTAIA therefore applies only to *export* commerce (see *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993)) and not to cartels, which directly involve U.S. domestic and import commerce.

Third, even if the FTAIA did apply here, it would not impose the requirement petitioners propose. Clause 2, which is not a standing provision, does not require that the plaintiff's own injury arise from the effect of the defendants' conduct on U.S. commerce. Instead – as the United States, every antitrust treatise, and every other contemporaneous commentator recognized, and as the legislative history makes clear – Congress adopted Clause 2 merely to provide that the Sherman Act does not apply to conduct that has a *pro*-competitive effect in this country.

Petitioners' contrary reading rests on parts of three sentences in one House Report. H.R. REP. NO. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report) (reproduced in App., *infra*). Legislative history that thin would not justify holding that Congress abandoned a century of precedent even if that Report addressed Clause 2 as finally enacted, but it did not. Even more important, in context, those quotations actually show that Congress intended to *reaffirm* the right of persons injured overseas to sue in U.S. courts.

Petitioners' "antitrust injury" and "antitrust standing" arguments, which mirror their jurisdictional arguments, are equally meritless. Those prudential doctrines seek to identify the most efficient enforcers of the antitrust laws; they do not create gaps immunizing unlawful activity from suit. Respondents are the prototypical enforcers of the antitrust laws; they are direct purchasers injured by the anti-competitive effects of petitioners' unlawful conduct, and their claims deter cartel activities that directly harm U.S. interests. Nor are cases like this one unmanageable; they are litigated together with the indistinguishable claims of domestic purchasers and require no special inquiries into foreign economic conditions because they allege *per se*

antitrust violations. Congress moreover declined in the FTAIA and afterwards to overrule decisions holding that a plaintiff's injury need *not* arise from the effects of anti-competitive activity on the United States.

Nor is there merit to the two remaining arguments advanced by petitioners' *amici*. First, the government's antitrust leniency program has no bearing on the questions presented, not least because it was adopted in all relevant respects well after Congress enacted the FTAIA. Pending legislation will limit the civil liability of leniency program participants, whereas the government's argument illogically would limit the exposure of companies that do *not* participate. And the government has in the past rightly disparaged precisely the argument it makes now. Worst, the government ignores that Clause 2 defines the *scope* of the Sherman Act, rather than the *standing* of private parties to sue, so petitioners' rule would equally limit the Sherman Act's application in criminal cases.

Second, "comity" and related doctrines are not presented here. In any event, petitioners have merely demonstrated the existence of *overlapping* jurisdictional regimes. Such overlaps are common, however, and do not preclude the exercise of U.S. jurisdiction. Of note, in contrast to *Hartford Fire*, there is not even an arguable conflict here between enforcement of the Sherman Act and any foreign regulatory regime, for cartels are universally condemned. But aggressive application of the Sherman Act remains necessary because current *enforcement* overseas is too lax to protect U.S. interests. Those nations that have anti-cartel laws but do not enforce them do not present comity concerns at all, since there is no substantive conflict of law and no risk of overlapping enforcement. Finally, it is Congress's job to account for changes in the international enforcement environment.

ARGUMENT

This case principally presents the question whether the "jurisdictional bar" of the FTAIA (Pet. Br. 42) limits the scope of the Sherman Act to instances in which the plaintiff's own claim arises from an anti-competitive conspiracy's effect on U.S. com-

commerce. It does *not* present the separate question whether, if the Sherman Act applies to respondents' claims and respondents have standing to sue, the U.S. courts should opt not to *exercise* jurisdiction to decide the claim. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. d (1987) ("[A]state may *exercise* jurisdiction based on effects in the state, when the effect or intended effect is substantial and the *exercise* of jurisdiction is reasonable under § 403.") (emphases added). No argument was made below that the court should pretermit this litigation based on comity, conflict of laws, or *forum non conveniens*. Thus, just as in *Hartford Fire*, this Court "need not decide" whether a court "should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. at 798. Such concerns "come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Id.* at 797 n.24 (citing *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (CA3 1979), which found jurisdiction, then remanded for consideration whether to exercise jurisdiction). See also Pet. C.A. Br. 41 n.16 (explaining that question presented by this case "*is different* from the question[] of 'comity'" (emphasis added)).[3]

Petitioners rightly note that the U.S. antitrust laws are intended to protect U.S. interests (Br. 8), but they seek a radical shift in the test for determining whether those interests are sufficiently implicated to trigger the Sherman Act's proscriptions. Petitioners focus on the antitrust laws' application to "transactions," a term that appears fifty-seven times in petitioners' brief, and zero times in the Sherman Act, the Clayton Act, and the FTAIA. In fact, it is settled that "the essence of any violation of Section 1 is the illegal agreement itself – rather than the overt

[3] In *Hartford Fire*, this Court rejected an attempt to incorporate concerns for the "reasonableness" of exercising jurisdiction into the definition of the scope of the Sherman Act. The Court held that Congress determined the "reasonable" scope of the antitrust laws when it codified the rule that the Sherman Act extends to overseas conduct with a substantial U.S. effect. 509 U.S. at 796-97 & nn.22-24.

acts performed in furtherance of it." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330-31 (1991).[4]

Furthermore, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796.[5] This "effects" doctrine, first articulated by Judge Learned Hand in *United States* v. *Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 444 (CA2 1945), was "pioneered" for just this type of case: "Offshore cartels (*paradigmatically*) could be regulated by the U.S. antitrust laws if the cartel members intended to restrain commerce into the United States and their cartel had effects in the United States." Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916 (2003) (emphasis added). Indeed, "one of the [Sherman Act's] express goals * * * was to combat the trusts and cartels which, as Senator Sherman put it, were 'imported from abroad.'" *Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. 42 (1981) (Prof. James A. Rahl) (Hearings on H.R. 2326).

Purporting to describe "every case where this Court has applied U.S. antitrust laws to foreign activity" (Br. 11), petitioners actually omit the three principal precedents addressing worldwide cartel activity. *United States* v. *American Tobacco Co.* confronted the "division of the world's business" in tobacco through "contracts (executed in England)." 221 U.S. at 182, 172. This Court held that the Sherman Act prohibited "the assailed combination in all its aspects * * * including the foreign corporations in so far as by the contracts made by them they became coöperators in the combination." *Id.* at 184. *United States*

[4] Sherman Act jurisdiction mirrors the principle that if a conspiracy has a sufficient nexus to this country, U.S. law applies even if *all* overt acts in furtherance thereof were committed overseas. See, *e.g.*, *United States* v. *Wright-Barker*, 784 F.2d 161, 168 (CA3 1986) (citing cases).

[5] See also RESTATEMENT § 402(1)(c) ("a state has jurisdiction to prescribe law with respect to * * * conduct outside its territory that has or is intended to have substantial effects within its territory").

v. *National Lead Co.*, 332 U.S. 319, 348 (1947), held unlawful foreign agreements underlying the international titanium cartel. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), affirmed an injunction against a conspiracy "to restrain interstate and foreign commerce by eliminating competition in the manufacture and sale of antifriction bearings in the markets of the world," including through "agreements providing for a territorial division of the world markets." *Id.* at 595. And indeed, "not a single one of the 248 foreign commerce antitrust actions brought by the Justice Department through May 1973 was dismissed for lack of subject matter jurisdiction." Barry E. Hawk, *Special Defenses and Issues*, 50 ANTITRUST L.J. 559, 560 (1981).[6]

The Sherman Act unquestionably renders petitioners' cartel unlawful under the effects test reaffirmed in *Hartford Fire*. With respect to all but one of the more than one dozen vitamins controlled by the cartel, the U.S. is the world's largest market, averaging 28% of all worldwide sales. Petitioners' cartel "affect[ed] billions of dollars of U.S. commerce and last[ed] for almost a decade." Belinda A. Barnett, Sr. Counsel to the Ass't

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[6] When this Court held that the Sherman Act does not apply, it was because the defendants' overseas conduct was *not* integrally related to anti-competitive effects in this country. A plaintiff may not merely assert the existence of a "global" conspiracy or "global" market but must, as here, be prepared to prove that the effects of the defendants' activities here and abroad are intertwined. In *Matsushita Electrical Industries* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), U.S. electronics manufacturers alleged that Japanese companies conspired to raise prices in Japan, using the profits to subsidize predatory pricing in the U.S. This Court reaffirmed that the Sherman Act "reach[es] conduct outside our borders * * * when the conduct has an effect on American commerce." *Id.* at 582-83 n.6. The Court held that the plaintiffs were accordingly required to prove that the "alleged cartelization of the Japanese market" caused "artificially depressed [prices] in the United States." *Ibid.* But the plaintiffs lacked such proof, and thus could not "recover antitrust damages based *solely* on an alleged cartelization *of the Japanese market*, because American antitrust laws do not regulate the competitive conditions of other nations' economies." *Id.* at 582 (emphases added). Petitioners quote only the *end* of this statement without acknowledging its context. Br. 11.

A.G., Antitrust Div., Speech of Nov. 30, 2000, at 2-3. As petitioners conceded below, "there is no real dispute that the vitamin companies' conduct had 'a direct, substantial, and reasonably foreseeable effect' on U.S. commerce." Pet. App. 9a.

So petitioners have no choice but to seek a dramatic change in the law. They ask this Court to restrict the Sherman Act to particular claims that arise from an effect on U.S. commerce. With respect to cartels in particular, petitioners' rule would effectively limit the Sherman Act to transactions that occur *in* U.S. commerce. See Br. 33 ("the location of individual 'transactions' [is] the controlling consideration for jurisdiction"). The Sherman Act's application to an anti-competitive worldwide cartel would for the first time be broken down transaction by transaction. In this brief, we demonstrate beyond peradventure that Congress did not intend to adopt this departure from the settled effects test.

I. Because Global Cartels' Domestic And Foreign Effects Are Inextricably Intertwined, Respondents Prevail Even Under Petitioners' Construction of The FTAIA And Foreign Plaintiffs' Claims Against Such Cartels Furthermore Directly Advance U.S. Interests.

As we demonstrate in the remainder of this brief, petitioners' arguments as to the scope of the Sherman Act are wrong. But even if petitioners were right on the law, their arguments would rest on two propositions that are simply wrong as a matter of basic economics: (i) that the effects of their cartel on U.S. commerce were irrelevant to respondents' injuries; and (ii) as such, the U.S. has no interest in deterring petitioners' conduct. The root of the error of both propositions is petitioners' failure to acknowledge that they were cartelizing a global market, not several geographically distinct markets. This premise – critical to their depiction of respondents' injuries as taking place in a "foreign market" and thus unrelated to the cartel's impact on the U.S. – is false, and without it, petitioners' arguments collapse.

This Part corrects petitioners' error, demonstrating that (A) the market for bulk vitamins is global; (B) the effects of the cartel on U.S. commerce gave rise to the claims of overseas pur-

chasers such as respondents; and (C) U.S. interests are advanced by recognizing the claims of all the cartel's victims.

A. The Market for Bulk Vitamins Is a Global Market.

Petitioners' brief rests entirely on the assumption that the bulk vitamins market is geographically divided, such that there is a distinct "U.S. market." See, *e.g.*, Br. 8, 40-41. This "U.S. market" is a fiction. Rather, there is a single, global market for bulk vitamins, which are fungible commodities bought and sold wherever the best price is available. Because transportation costs are minimal, purchasers can secure, and producers will deliver, supplies from whatever region of the world offers the best price.[7]

Respondents' complaint alleges that petitioners, who comprise essentially the entire worldwide production capacity for bulk vitamins, cartelized this "global market." J.A. 55.[8] Tracking the government's indictment of petitioners – under which they were prosecuted for the operation of their "worldwide" cartel "in the United States and elsewhere" (see *supra* at 1) – the complaint explains that the petitioners agreed to "fix, increase, and maintain the price and allocate the volume" for vitamins in "the United States and elsewhere." J.A. 35. As cartel participants admitted in documents disclosed in a vitamins trial, petitioners rigorously implemented "a proposal for the global and regional allocation of sales volumes among the companies."

[7] We are advised that Professor John M. Connor and others are submitting an *amicus curiae* brief detailing the features of the global vitamins market.

[8] The complaint's allegations not only must be taken as true at the motion to dismiss stage, but they comport with this Court's precedents on market definition. "[T]he relevant competitive market * * * is of course the area in which respondents and the other * * * producers effectively compete." *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961). As Judge Posner explains, the relevant "market" is defined not by geographic boundaries, but by "the output of the suppliers to which a group of customers can turn for their requirements of a particular product." *United States* v. *Rockford Mem. Corp.*, 898 F.2d 1278, 1283 (CA7 1990) (citing *Tampa Electric*).

Animal Sci. Prods. v. *Chinook Group*, Misc. No. 99-197, MDL 1285 (TFH), Pl. Exh. G-12, at 1.[9]

B. The Effects Of Petitioners' Conduct On U.S. Commerce Gave Rise To Respondents' Claims.

Assuming *arguendo* that, as petitioners contend, Clause 2 of the FTAIA applies to this case *and* requires that the effect of the defendant's conduct give rise to the plaintiff's claim, respondents' claims meet that test. In a global market, the location of particular purchases is economically irrelevant: respondents' complaint is not merely directed at the sellers from whom they bought, nor at those sales transactions, but at the overall conspiracy that deprived them of the opportunity to purchase at competitive prices from *anyone*. As the D.C. Circuit recognized, respondents "claim that [they] were injured as a direct result of the increases in United States prices even though they bought vitamins abroad." Pet. App. 3a. Petitioners' maintenance of the cartel in the U.S. precluded overseas purchasers from purchasing vitamins in the U.S., or in their own countries from intermediaries who purchased here for resale abroad.

Indeed, petitioners entered into a worldwide conspiracy *precisely* to prevent their customers in one region from turning elsewhere to escape the cartel's super-competitive prices. See 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.13, at 213 (2003) (describing the "interdependence of the foreign and U.S. injured parties in * * * *Empagran*" because "the success of the global restraint" depended on cartelizing all national markets). As respondents argued in the district court, "prices in the United States were integrally interconnected with the prices outside of the United States. Pricing inside reflected pricing outside. * * * There was

[9] For example, petitioners' market division scheme included an agreement that a principal vitamins supplier would "exit[] North America by July 1993 or sooner." *Id.*, Pl. Exh. 120. See also *id.*, Pl. Exhs. 80, 84, 108, 140, 153 (charts and maps of allocated sales). Petitioners also purchased a U.S. producer's overproduction "to keep [that producer] from disrupting * * * markets outside of the United States" (*id.* Pl. Exh. G-12, at 37); and endeavored to buy out manufacturers that did not participate in the cartel (see, *e.g.*, *id.*, Pl. Exh. G-12, at 7).

a unitary world market where virtually all purchasers * * * were considered fungible, and an injury in one market caused an injury in every other segment of that market." C.A. J.A. 72.

Indisputably, had respondents attempted to purchase vitamins from cartel members in the U.S. at competitive prices, this suit would be proper. But overseas purchasers cannot be expected to take such a futile step; petitioners' cartel commitments were the equivalent of placing out a sign in the United States declaring, "Sales to foreign purchasers prohibited."

Petitioners' conspiracy in the U.S. caused respondents' injury in another sense: if the conspiracy had not extended to the U.S., it would have collapsed worldwide. It is well established that if not prevented, arbitrage will destroy a price-fixing cartel or at least severely limit its profits. As a consequence of "the resale by the low-price purchasers to the purchasers to whom the seller charges a high price" abroad, petitioners "would have no sales at [the higher price]." RICHARD A. POSNER, ANTITRUST LAW 83 (2d ed. 2001). Given the central role of the U.S. economy in world trade, "including the United States in a price-fixing conspiracy is necessary to generate monopoly profits." *Den Norske Stats Oljeselskap AS* v. *Heeremac v.o.f.*, 241 F.3d 420, 435 (CA5 2001) (Higginbotham, J., dissenting).

Thus, even on petitioners' construction of the FTAIA, requiring that the U.S. effects "give rise to" the *plaintiff's* claim, the statute does not bar respondents' claims. The phrase "gives rise to" in Clause 2 requires causation, but not that the plaintiff be injured *in* U.S. commerce. See U.S. Br. 14 n.3 (conceding this point); cf. *United States Indus./Fed. Sheet Metal* v. *Director*, 455 U.S. 608, 615 (1982) (language "arising out of" simply imposes a causation requirement). Here, the anti-competitive effects of petitioners' worldwide cartel on the United States are a "but for" cause of respondents' injuries; absent those effects, petitioners could have escaped cartel-dictated prices by purchasing from U.S. suppliers or from intermediaries who did. Nor is this causation "indirect and remote." Contra Pet. Br. 41. To the contrary, respondents' injuries are a completely foreseeable effect of petitioners' conduct with respect to the United States – indeed, respondents' inability to make lower-priced purchases in

the United States was the *intended* consequence of that conduct, not some unpredictable incident of it. Thus, even on the reading *most* favorable to petitioners – requiring that the U.S. effects be both a factual and a proximate cause of the plaintiff's own injury – respondents would still prevail.[10]

C. U.S. Interests Are Directly Advanced By Recognizing The Claims Of All Victims Of An Integrated Cartel That Operates In The United States.

As Judge Higginbotham has explained, given the integrated nature of global markets, claims of foreign cartel victims "serve a single function: the protection of United States commerce." *Den Norske*, 241 F.3d at 438-39 (dissenting opinion). Indeed, foreign purchasers are, in cartel cases like this one, essentially the *only* enforcers of the antitrust laws with respect to the cartel's unlawful activities abroad. If a U.S. vitamin manufacturer had sought to compete abroad against the cartel's members, it could unquestionably have sued petitioners under the Sherman Act (see, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 124-25 (1969); *Cont'l Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 700, 704 (1962)), but because petitioners cartelized all bulk vitamins suppliers, all of the U.S. companies that could have been *competitors* are in fact *co-conspirators*. And suits by U.S. purchasers alone cannot deter cartels because they cannot force them to dis-

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[10] Proximate cause is probably not required, however. In various other contexts, courts have refused to infer such a test from similar language requiring that a plaintiff's claim "arise" from a particular cause. See, *e.g.*, *SFH, Inc.* v. *Millard Refrigerated Servs.*, 339 F.3d 738, 743 (CA8 2003) (only "but for" cause required); *Hamilton* v. *United Healthcare of La.*, 310 F.3d 385, 391 (CA5 2002) ("arising out of" means "incident to, or having connection with"); *Williams* v. *Imhoff*, 203 F.3d 758, 765-66 (CA10 2000) ("arising out of" means "'originating from,' 'growing out of,' or 'flowing from,'" and does not require proximate cause); *Ballard* v. *Savage*, 65 F.3d 1485, 1500 (CA9 1995) (applying "but for" test to determine if plaintiff's claim arises from contacts with the forum for personal jurisdiction purposes); *Lanier* v. *Am. Bd. of Endodontics*, 843 F.2d 901, 909 (CA6 1988) ("arising from" means "made possible" by or "lies 'in the wake' of" (quoting CA7 cases)).

gorge their overseas profits. Petitioners' position would thus "change[] the calculus of risk for rational cartel participants in a way that significantly decreases the law's deterrent effect on international cartels." Ronald R. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, ANTITRUST, Summer 2001, at 53.

Specifically, the deterrent value of foreign purchasers' claims furthers U.S. interests in three respects. First, just as foreign consumers benefit when civil liability deters the closure of the U.S. market, U.S. consumers benefit directly when the overseas activities of an integrated, worldwide cartel are deterred. See *supra* at 11. Had petitioners fixed prices only in this country, U.S. purchasers could have obtained vitamins at competitive prices, either directly from abroad or from arbitrageurs. And had petitioners' market allocation scheme not kept certain suppliers out of the U.S. market, U.S. consumers would have benefited from lower-cost foreign supplies. Thus, petitioners engage in "semantic * * * gamesmanship" in characterizing their cartel as involving "a 'foreign conspiracy' * * * separate from 'a U.S. conspiracy'"; "but for the alleged foreign anticompetitive activity, it would have been impossible, given the globalized nature of the relevant markets, to impose an anticompetitive overcharge in the United States." Davis, *supra*, at 53, 54.

Second, deterring cartel activity abroad prevents cartels from emerging and accelerates their collapse, both to the benefit of U.S. consumers. Had petitioners' agreement not extended worldwide, its profits would have been severely limited by arbitrage. The availability of vitamins for export at competitive prices from overseas would have precluded super-competitive pricing anywhere else in the world, including the U.S. Indeed, when several Chinese suppliers, who were not cartel participants, began selling certain bulk vitamins in the global market in the mid-1990s, the cartel-set prices collapsed broadly. JOHN M. CONNOR, GLOBAL PRICE FIXING 293, 325 (2001).

Third, imposing liability for *all* of a worldwide cartel's activities prevents the participants from using their illegal overseas profits to subsidize the risk of liability in this country. In *Pfizer*,

this Court refused to bar foreign plaintiffs' claims and thereby "lessen the deterrent effect of treble damages":

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely export abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

434 U.S. at 315. This Court rejected the defendants' argument (echoed by petitioners) that the antitrust laws protect Americans, a contention that "confuses the *ultimate purposes* of the antitrust laws with the question of *who can invoke* their remedies." *Ibid* (emphases added). See also *infra* at 32 (discussing FTAIA legislative history embracing *Pfizer*'s rationale).[11]

The added deterrent value provided by foreign purchasers' claims is vital in the context of a global cartel. Petitioners have recently paid approximately $5 billion in criminal and civil sanctions, a sum that not only is significantly lower than the approximately *$10 billion* in profits that the cartel realized during the 1990s, but is dwarfed by the present value of those profits.

Even that comparison overstates the deterrent value of the liability imposed on petitioners, *who were caught*. Adequate deterrence requires monetary liability that not only removes all illegal profits, but also reflects the probability that the wrongdoers might not have been caught. RICHARD A. POSNER, ECO-

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[11] Petitioners' assertion that the plaintiffs in *Pfizer* purchased goods in the U.S. export market, not overseas (Br. 37), not only is "not clear" as a factual matter (SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 9:9, at 9-25 (3d ed. 1997)), but also is a distinction without a difference. The location of the transaction often reflects happenstance; it says nothing about where its anti-competitive effects will be felt. Not surprisingly, this Court's opinion in *Pfizer* "betrayed no interest in minutiae, such as the geographic situs of transfer of title." Davis, *supra*, at 53, 54.

NOMIC ANALYSIS OF THE LAW 77-78 (1st ed. 1972). The available data on purely domestic cases "estimate[s] the probability of successful government prosecution of a price-fixing conspiracy in the United States to be, at most, between 13 and 17 percent." Wouter P.J. Wils, *Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?* 13 (2001). International cartels are even more difficult to uncover, given their extraordinary sophistication, the fact that their activities often occur abroad, and the availability of national boundaries as a "cover" for the absence of international competition. See James M. Griffin, Dep. Ass't A.G., Speech of Apr. 6, 2000.

Moreover, because a cartel cannot be sustained elsewhere if the U.S. market is competitive, effective deterrence requires that a cartel face punishment in the U.S. sufficient to offset its profits everywhere. See Harry First, *Evolving Toward What? The Development of International Antitrust*, *in* THE FUTURE OF TRANSNATIONAL ANTITRUST LAW 47 n.91 (Josef Drexl ed., 2003).[12]

3. Given the foregoing, petitioners' argument that the United States has no interest in compensating foreign purchasers (Br. 35-36) is sleight of hand, for "the goal of sanctioning cartel conduct is *general deterrence*, *i.e.*, to deter others from engaging in the offending conduct." James M. Griffin, Dep. Ass't A.G., Speech of May 2002, at 6 (emphasis added). Congress adopted the Clayton Act's civil damage remedy, in particular, to "enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing." Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976). That remedy enhances deterrence in two ways: by increasing the probability of detection by creating an incentive for private litigants to uncover cartels; and by increasing the penalty upon detection.

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[12] For the reasons detailed in the text, the view that the antitrust laws should not be read "to apply United States law to a transaction whose relation to the United States" is "minimal" (1A AREEDA ET AL., *supra*, ¶ 273c4 n.25 (2003 Supp.)) does not undercut the specific basis for finding jurisdiction over worldwide cartels.

There is "no dispute that cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards." Scott D. Hammond, Dir. of Crim. Enf., D.O.J. Antitrust Div., Speech of Sept. 12, 2000, at 4. Petitioners' hard core price-fixing in an unregulated market – "the supreme evil of antitrust" (*Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 879 (2004)) – calls for the most severe sanction. Congress did not intend the protection of U.S. interests to "depend on the uncertainties of foreign antitrust enforcement." Pet. App. 33a. Further, even accounting for other nations' anti-cartel enforcement mechanisms, it is clear that, as the OECD has recently concluded, "larger sanctions are required to achieve effective deterrence." OECD, HARD CORE CARTELS 3 (2002). Economic studies have calculated the "optimal fine" for deterrence purposes as at least "187% of the *commerce affected* by the cartel," not merely the monopoly profits, such that "actual fines imposed were found to be less than 1% of the level necessary to deter cartel conduct. While fines have increased significantly [since then,] they are not now and never will be *anywhere near* the optimal fine level established by those studies." James Griffin, Dep. Ass't A.G., Speech of May 2002, 6-7 (emphasis added).[13]

The need for greater sanctions in part reflects the fact that foreign anti-cartel provisions are rarely enforced. Although "more than 90 countries now have antitrust laws, and almost all of these laws have anti-cartel provisions," "[h]aving laws is not enough; they must be enforced." William J. Kolasky, Dep. Ass't A.G., Speech of Jan. 25, 2002. As the government's principal modern study on international antitrust enforcement recently concluded, "[O]verall anticartel enforcement levels around the world *remain fairly low outside the United States*." Int'l Comp. Pol'y Adv. Comm., Final Rep't to the A.G. 186 (2000) (DOJ ICPAC Final Report) (emphasis added).[14]

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[13] We are advised that Joseph Stiglitz, Nobel Laureate and former World Bank Chief Economist, is submitting an *amicus curiae* brief demonstrating that worldwide cartels are seriously under-deterred.

[14] A principal gap in cartel enforcement results from the refusal of national governments to enforce competition laws against resident

This case illustrates the point dramatically. Petitioners report that they have been subject to governmental actions by four competition authorities ("the European Union, Canada, Australia, and Korea") and private actions in seven nations ("Canada, the United Kingdom, Germany, Belgium, and the Netherlands," as well as "Australia and New Zealand"). Br. 4. Yet the cartel inflicted injuries in countries the world over.

Furthermore, the deterrent effect of foreign civil liability is minimal; civil suits against cartels in other countries have been largely unsuccessful. For example, although petitioners tout European enforcement, the Deputy Head of the EC Directorate General for Competition very recently confirmed that there has long been "limited private enforcement of EC competition rules." Donncadh Woods, Paper of Feb. 20, 2004, at 3, 5.[15] And even when private damages are awarded, "[t]he published cases

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corporations. "Cartels continue to be a way of life in many parts of the world, impeding economic performance, promoting inequality, impoverishing consumers, and thereby providing fuel for those who oppose globalization and free market ideals." William J. Kolasky, Dep. Ass't A.G., Speech of Jan. 25, 2002, at 2. Cartels, "which seem to be quite frequent and to affect a number of countries," "create a competition problem in foreign countries" whose "competition laws and policies in the countries in which they take place are usually *powerless* to curb them. Indeed, the jurisdiction of domestic competition authorities is usually limited to practices which affect competition in their own country." Frédéric Jenny, Chairman, OECD Competition Law and Pol'y Comm., *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *in* COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 295, 306 (Clifford A. Jones & Mitsuo Matsushita eds., 2002).

[15] For example, in England "there has been *one* successful action * * *, against the snooker world governing body"; "[i]n Italy there does not appear to have been *any* successful damages actions"; and "in Germany the only [successful] action [was] a declaratory action and no damages were awarded." Donncadh Woods, Paper of Feb. 20, 2004, at 17 (emphases added). A German court recently "held that purchasers of cement at cartel prices could not claim damages *unless they had been individually targeted* by a market-sharing cartel." *Id.* at 10 (citing *Max Boegl Bauunternehmung* v. *Hanson Germany*, Judgment of the Berlin Landgericht of 27 June 2003 (emphasis added)).

that have reached a decision in Europe suggest that damages awarded by national courts are modest in value." *Id.* at 6.[16]

II. The FTAIA's Jurisdictional Limitation Does Not Apply To Conduct Involving Import Commerce And Thus Does Not Apply To Worldwide Cartels.

Even if this Court did not accept our argument that respondents' claims arose from the U.S. effects of petitioners' conduct, respondents would still prevail because the premise of petitioners' brief – that the FTAIA applies to this case – is wrong. In fact, the FTAIA does not apply to worldwide cartels, which are not limited to U.S. export commerce. See Resp. C.A. Br. 17. Congress did not take the illogical step, contrary to U.S. interests, of narrowing the Sherman Act's application to cartels' overseas activities in public and private enforcement actions.

A. The FTAIA Limits The Scope Of The Sherman Act Solely In Cases Involving Only U.S. Export Commerce.

1. The FTAIA was enacted as Title IV of the Export Trading Company Act of 1982. Congress expressly declared: "[T]he purpose of this Act is to increase United States exports of products," including "by modifying the application of the antitrust laws to certain export trade" in the FTAIA. Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234 (1982). "Every single congressional finding relates to the importance of export business and the need to encourage export activity by American business." *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting).

Two features make clear that the FTAIA promotes U.S. exports without *otherwise* narrowing the Sherman Act's reach. First, the provision that includes Clauses 1 and 2, and thereby defines the scope of the Sherman Act, is limited by its introductory language to conduct involving foreign commerce "*other than* import trade or import commerce" (emphasis added). This provision was intended to replace the courts' varying "expression[s] of the proper test for determining" jurisdiction in export

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[16] Nor could the existence of foreign antitrust regimes have informed the Congress that enacted the FTAIA; in 1982, "few countries had antitrust laws and fewer still enforced them." Charles A. James, Ass't A.G., Speech of Oct. 17, 2001, at 2.

cases (App., *infra*, at 4a) and thereby "create more certainty in the application of antitrust laws for those people who are about to engage in export trade activities" (Sherman E. Unger, *The Role of the Commerce Department*, *in* THE EXPORT TRADING COMPANY ACT OF 1982 11, 12 (Joseph P. Griffin ed., 1982)).

As this Court has already recognized, this critical introductory language – which petitioners omit (see Br. 3, 15) – means that the FTAIA's requirements apply only to "conduct involving foreign trade or commerce, *other than import trade or import commerce*." *Hartford Fire*, 509 U.S. at 796 n.23 (emphasis added). "The FTAIA was intended to exempt from the Sherman Act *export* transactions that did not injure the United States economy." *Ibid.* The FTAIA's statutory limitation, in sum, "applies to *export* trade." 1A AREEDA ET AL., *supra*, ¶ 273c4 (emphasis in original). Accord RESTATEMENT § 415 cmt. a ("Congress has limited the application of the antitrust laws where they would affect United States export trade only.").[17]

Second, Congress effectuated its intent to further the interests of exporters in the FTAIA's proviso, which states:

> If sections 1 to 7 of this title [the Sherman Act] apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a. Cases governed by "paragraph (1)(B)" – which we will call "export cases" – affect U.S. commerce only with respect to "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." *Id.* § 6a(1)(B).

[17] By contrast, if Congress had intended the FTAIA to provide a universal standard for international antitrust actions, it would have neither included the statute's introductory limitations nor limited its application only to *Sherman Act* claims. "It had been proposed that the standard of 'direct, substantial, and reasonably foreseeable effect' set out in the [FTAIA] should be applied to all types of commerce of the United States, including import and domestic commerce, and that the amendments apply also to the Clayton Act (dealing with mergers and acquisitions); the suggestions were not accepted by Congress." RESTATEMENT § 415, rptrs. notes (emphasis added).

The proviso limits standing in export cases by "preclud[ing] suits by foreign purchasers of U.S. exports." Pet. Br. 19. The effect of the proviso is that "[f]oreign plaintiffs complaining of injuries sustained as a result of such combination of exporters would, in effect, *lack standing* under the Sherman Act." RESTATEMENT § 415, rptrs. notes (emphasis added). The proviso's restriction on standing notably does *not* apply to non-export cases, like this one, which are instead governed by paragraph (1)(A) and thus involve conduct that has a sufficient effect on "trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations." 15 U.S.C. 6a(1)(A). Indeed, the legislative history makes that very point. "Under current law, foreign nationals located abroad may in certain circumstances recover under our antitrust laws. *H.R. 5235 does not change that.* But if the requisite effect is felt *only* with respect to our export commerce, then H.R. 5235 does limit who may recover to persons engaged in export trade or commerce 'in the United States.'" 128 Cong. Rec. 18,953 (1982) (Rep. McClory) (emphases added).

2. This case implicates neither the text of the FTAIA nor its purpose. And cartels, by restricting where participants may sell, *harm* exporters by foreclosing U.S. export opportunities.

In enacting the FTAIA to promote U.S. exports, Congress did not change the long-settled rule that the Sherman Act governs the domestic and foreign activities of cartels affecting the U.S.: "*[o]f course*, [the FTAIA] was *not* intended to cover the situation of a foreign cartel targeting United States markets." 1A AREEDA ET AL., *supra*, ¶ 272i n.69 (emphases added). "Importantly, the [FTAIA] is not intended to affect jurisdiction over foreign conduct affecting *imports* into the United States. The Sherman Act's application to United States and foreign participation in international *cartels* remains unchanged, as the House Report expressly recognizes." Barry E. Hawk, *International Antitrust Policy and the 1982 Acts*, 51 FORDHAM L. REV. 201, 220 (1982) (emphases added). "*It could not be clearer* that the FTAIA serves to exempt exporting from antitrust scrutiny, not to

limit the liability of participants in transnational conspiracies that affect United States commerce." *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting) (emphasis added).

The government's Antitrust Enforcement Guidelines for International Operations expressly state that cartels like petitioners' "Vitamins, Inc." are not subject to the FTAIA. The Guidelines declare that conduct implicating foreign commerce is subject to one of two jurisdictional tests: (i) *Hartford Fire*'s rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"; or (ii) the FTAIA standard. U.S. D.O.J., *Antitrust Enforcement Guidelines for International Operations* § 3.11 (1995). The Guidelines explain that, because the FTAIA applies only "to foreign commerce *other than imports*," it does *not* apply to cartels of "foreign companies that produce a product in various foreign countries" and "make substantial sales into the United States." *Ibid.* (emphasis added). So long as the cartel engages in U.S. *import transactions*, jurisdiction over the *entire cartel* "is clear under the general principles of antitrust law expressed most recently in *Hartford Fire*," because the facts "demonstrate actual and intended participation in U.S. commerce." *Ibid.* By contrast, the FTAIA *would* apply when there are *no* direct sales to the U.S., *i.e.*, "in cases in which a cartel of foreign enterprises * * * reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary." *Id.* § 3.12.

The same conclusion follows from the version of the Guidelines in effect at the time Congress enacted the FTAIA. Congress intended the FTAIA's jurisdictional provision to function as "a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards." App., *infra*, 5a. At that time, the 1977 Guidelines provided that Sherman Act jurisdiction extends to cartels without regard to where particular activities in furtherance of the cartel occurred. U.S. D.O.J., *Antitrust Guide for International Operations*, Case L, "Dealing With A Cartel" (Jan. 26, 1977). As described by the then-Deputy Assistant Attorney General for Antitrust, the position of the United States accordingly was "*strongly* that the application of the antitrust laws to *foreign transactions* is *essential* to effective domestic enforcement." John H. Shenefield, *The Perspective of the U.S. Department of Justice*, *in* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12, 24 (Joseph P. Griffin ed., 1979) (emphases added).

B. The Authorities Cited By Petitioners Actually Support *Respondents'* Reading Of The FTAIA.

In contrast to this overwhelming evidence of the limited aegis of the FTAIA, petitioners muster four quotations from scholars ostensibly indicating that Congress intended to eliminate the claims of purchasers in overseas markets. But each of those quotations actually addresses the FTAIA's proviso on *export* commerce, *not* its provision defining the Sherman Act's scope.

First, petitioners quote the Areeda antitrust treatise as stating that "'a foreign consumer whose only injury is felt entirely in his foreign country cannot [sue].'" Br. 14 (brackets in Pet. Br.). In fact, the full quote states:

> The *final quoted sentence* [of the FTAIA] is designed to make clear that a foreign firm *operating an export business* in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States. Thus, although the exporter can sue with respect to the injured *export business*, a foreign consumer whose only injury is felt entirely in his foreign country cannot.

1A AREEDA ET AL., *supra*, ¶ 272h (emphases added).

Petitioners next quote a law review article to the effect that "foreign consumers need not be protected by the U.S. antitrust laws." Br. 35-36. In fact, the full quote states:

> Similarly, Atwood's suggestion that foreign consumers need not be protected by the U.S. antitrust laws has been largely enacted into law, *in Title IV's provision that only those involved in U.S. export business may complain of restraints on U.S. exports.*

David Gill, *Review of Antitrust and American Business Abroad*, 77 AM. J. INT'L L. 679, 781 (1983) (emphasis added).

Petitioners next quote an international antitrust treatise as stating that "[a]ntitrust injury suffered in foreign markets is excluded." Br. 36. In fact, the full quote states:

> The purpose and thrust of the FTAIA have been discussed above. Antitrust injury suffered in foreign markets is excluded from the scope of the Sherman and Federal Trade Commission Acts *unless it involves injury to a U.S. exporter*. Therefore, a foreign company claiming injury in one or more foreign markets *resulting from restraints of trade on the part of U.S. exporters* has no U.S. antitrust cause of action.

MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 52 (2001) (emphases added). The "discuss[ion] above" to which the author refers explains that the FTAIA "provid[es] a definition of the jurisdictional reach of the Sherman and FTC Acts *in the realm of export trade*." *Id.* at 51 (emphasis added).

Petitioners finally quote another treatise as stating that the FTAIA "exclude[s] claims for [injuries] incurred only in foreign markets." Br. 36 (second alteration in Pet. Br.). In fact, this quotation appears in the treatise's chapter on "Export Commerce," and specifically addresses the FTAIA's "limitation of standing *to foreclosed U.S. exporters*." 1 HAWK, *supra*, at 182.2-.3 (Supp. 1996-1) (emphasis added). The full quote then states with respect to such export claims:

> [The FTAIA] affects only jurisdictional rules and standing in the limited sense to exclude claims for [injury] incurred only in foreign markets. Substantive rules concerning antitrust injury and antitrust standing generally were not intended to be affected by Title IV. The House Report states as an example that the mere fact that *an exporter* may be financially harmed by the challenged conduct does not necessarily mean that it has sustained antitrust injury. Thus there may be no antitrust injury where harm is only to an individual firm (*exporter*) and there is no harm to competition.

Ibid (emphases added). The treatise author manifestly does not agree with petitioners. See *id.* at 177-78 (concluding that "Sherman Act jurisdiction over international cartels that affect imports and harm domestic competition remains unchanged");

id. at 292 n.79 ("The 1982 amendments to the Sherman and FTC Acts were not intended to change their jurisdictional reach over international cartels.").

III. Congress Inserted Clause 2 Merely To Ensure That The Covered Foreign Conduct Must Have An *Anti-Competitive* Impact On Domestic Commerce To Be Actionable Under The Sherman Act.

Even if the FTAIA applies to this case, Clause 2 does not require that the U.S. effects give rise to the plaintiff's claim. Rather, it requires only that the challenged conduct's effect on U.S. commerce be *anti*-competitive.

At the time the FTAIA was enacted (several years before this Court's decision in *Matsushita*), there was "great confusion over whether the [defendants' conduct] must in some way *adversely* affect the commerce involved." James A. Rahl, *American Antitrust and Foreign Operations*, 8 CORNELL INT'L L.J. 1, 7 (1974). Congress resolved that confusion by adopting Clause 2 to codify the Second Circuit's holding in *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (1981), that only *anti-competitive* effects on U.S. commerce are actionable. Accord *Kruman*, 284 F.3d at 399-400; *Den Norske*, 241 F.3d at 432 n.36 (Higginbotham, J., dissenting). As one of the principal House sponsors, Representative McClory, explained:

> Another point which might be misunderstood regarding the standard of [the FTAIA] is the nature of the effect. Clearly, our exports create jobs and increase profits in the United States and thus have a beneficial impact on our economy. But this effect does not satisfy the standard of [the FTAIA]. * * * For what is needed is an effect in the United States, either in its domestic or its export commerce, which *gives rise to a claim under the antitrust laws*, as known today or as hereafter amended. Thus a beneficial effect or an adverse effect is, as such, insufficient. It must be an antitrust effect.

128 Cong. Rec. 18,953 (1982) (emphasis added).

Indeed, in the wake of the FTAIA's passage, the consensus view was that Congress adopted Clause 2 simply to codify the

National Bank of Canada rule. Petitioners' assertion that "[f]ollowing enactment of the FTAIA, scholars and enforcement officials understood the amendment to preclude recovery for foreign injury" (Br. 35) is simply wrong:

- The government has for decades taken the view that Clause 2 merely adopts the *National Bank of Canada* rule.[18]
- *Every* antitrust treatise agrees. *E.g.*, 1A AREEDA ET AL., *supra*, ¶ 272h2 n.49 (under Clause 2, "the effects must be 'of the type that the antitrust laws prohibit'").[19]
- *Every* contemporaneous law review commentator agreed.[20]

For the following reasons, this consensus view is correct.

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[18] See, *e.g.*, Donald Zarin, Office of Gen. Counsel, Dep't of Commerce, *The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 GEO. WASH. J. INT'L L. & ECON. 297, 313-14 (1983) ("In addition to requiring a direct, substantial, and reasonably foreseeable effect, title IV requires, as a jurisdictional element, that the effect *give rise to a claim* under the Sherman or FTC Acts. *This language* apparently is intended to ensure that an anticompetitive effect exist as a condition precedent to the assertion of jurisdiction." (emphases added)); Charles S. Stark, Chief, Foreign Commerce Section, U.S. D.O.J., Speech of Dec. 5, 1983, at 20-21 ("Title IV was intended not merely to clarify the quantum of domestic impact required to support antitrust jurisdiction, but the kind of impact. According to the Committee, 'the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit.' The remainder of the discussion in the report, and its reference to the *National Bank of Canada* case, make it clear that the effect on U.S. commerce has to be an anticompetitive effect.").

[19] See also 1 WALLER, *supra*, § 9.7, at 9-12 to -13 (Supp. 2003); 1 HAWK, *supra*, at 179 (1996-1 Supp.); 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.14, at 106 (5th ed. 1996).

[20] *E.g.*, John F. Bruce & John C. Pierce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975, 986-87 (1983); Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 223 (1982); John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 365 & n.85 (1983); A. Paul Victor & John G. Chou, *United States Antitrust Jurisdiction Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and* Timberlane, 10 FORDHAM INT'L L.J. 1, 14 (1986).

A. The Drafting History, Text, And Structure Of The FTAIA Confirm Congress's Intent To Adopt The *National Bank of Canada* Rule.

1. Clause 2's drafting history illuminates the statutory language. The "problem" addressed by Clauses 1 and 2 was the "possible ambiguity in the precise legal standard" under prior case law – specifically, "the *quantum* and *nature* of the effects required to create jurisdiction." App., *infra*, 9a (emphases added). As originally proposed, the FTAIA addressed only "quantum," requiring a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Foreign Trade Antitrust Improvements Act, H.R. 5235, 97th Cong. § 7(1) (1982). Contrary to petitioners' assertion that such an effect "would, virtually by definition, give rise to 'a claim' by *someone*" (Br. 20), the A.B.A. explained that the original bill "ignore[d] whether conduct has an adverse effect on competition," such that "conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which also has a neutral or procompetititve domestic effect would be subject to the antitrust laws." Hearings on H.R. 2326, *supra*, at 259.

In response to the A.B.A.'s point, Congress added Clause 2. App., *infra*, 19a. Quoting the A.B.A.'s comments and citing *National Bank of Canada*, the House Report explains that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

Ibid (emphasis in original). The Report subsequently reiterates that, under the bill as revised, "the proscriptions of the Sherman Act do not apply to *export or purely foreign commerce* unless the conduct has a direct, substantial and reasonably foreseeable *anticompetitive* effect on domestic or import commerce, or a domestic export opportunity." *Id.* 23a (emphases added).

In response to the A.B.A.'s comments, Clause 2 was initially revised to require that the effect on U.S. commerce be "the basis of the violation alleged under this Act." H.R. 5235, 97th Cong. § 7(2) (1982), *reprinted at* App., *infra*, 3a. Precisely because that language might be misread in the way petitioners now propose, it was further revised. As explained by Congressman Rodino (the author of the bill and revision), the Committee "added th[e] language" of Clause 2 simply "to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect." *Id.* 29a (emphasis in original). The final language enacted into law – that the effect on U.S. commerce must "give rise to a claim" – was adopted to *reject* any "suggest[ion] that an effect, rather than conduct, is the basis for a violation." *Ibid.* Petitioners, of course, press *precisely* the construction that the statute was revised to reject: "that the effect" on U.S. commerce, "rather than conduct" (*i.e.*, petitioners' conspiracy), "is the basis for a violation" of the Sherman Act.

Moreover, Congress rejected proposals offered by business groups that indeed would have prohibited suits by persons not injured as a result of the effect on U.S. commerce.[21] These proposals sought to provide "antitrust liability only to those persons injured within the United States." Hearings on H.R. 2326, *supra*, at 109 (statement of Martin F. Connor, General Electric Co.). Congress did not indicate any solicitude for that view,

[21] See *The Foreign Trade Antitrust Improvements Act: Hearings on S. 795 Before the Comm. on the Judiciary*, 97th Cong. 130 (1981) (Business Roundtable) (proposing: "If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable *only for any injury so occurring within the United States* by reason of such restraints." (emphasis added)); Hearings on H.R. 2326, *supra*, at 39-40 (General Motors Corp.) (proposing: "This Act shall not apply to conduct involving trade or commerce with any foreign nation unless, and *only to the extent that*, such conduct has a direct, substantial and foreseeable effect on trade or commerce within the United States or has the direct, substantial and foreseeable effect of excluding a domestic person from trade or commerce with such foreign nation." (emphasis added)).

other than in the proviso, which *did* narrow foreign purchasers' standing in *export* cases.

2. The FTAIA's *structure* refutes petitioners' transaction-by-transaction approach to Sherman Act jurisdiction as well. Clause 1 limits the Sherman Act's application by reference to "conduct." The courts of appeals are unanimous that the term "conduct" "refers to any conduct that would violate sections 1 to 7 of the Sherman Act absent the FTAIA." *Kruman*, 284 F.3d at 398. Accord Pet. App. 9a. In a Section 1 case, the defendants' "conduct" is – as the government concedes – "their conspiracy to fix prices and allocate markets" (U.S. Br. 14), not isolated sales transactions. "The illegal act in this case was not the *imposition* of high prices but the *formation of the agreement to fix prices*." *Kruman*, 284 F.3d at 398 (emphasis added).

Clauses 1 and 2 work in conjunction; the latter defines the nature of the U.S. effect required by the former. Clause 2 contains no suggestion that Congress intended it nonetheless to have a very different focus: not on the defendant's conspiracy but instead on particular sales transactions. Given this structure, Clause 2 is most naturally read as addressing the same issue as Clause 1 – *viz.*, determining whether the Sherman Act proscribes the defendant's *conspiracy*. It is not naturally read to shift the jurisdictional inquiry from the defendant's conduct to whether the particular claim before the Court arises in U.S. commerce.

3. For three reasons, Clause 2's text confirms that Congress intended simply to adopt the *National Bank of Canada* rule.

First, Clause 2 refers to "a claim," which naturally means "any claim," and which contrasts with the requirement of the prior version of Clause 2 that Congress rejected, that the effect on U.S. commerce be "the basis for *the* violation." Petitioners' reading furthermore avowedly requires inserting the word "plaintiff" into the statute: "The indefinite article 'a' refers generically to 'a claim' *of the plaintiff—i.e.*, any claim that *the plaintiff* may have 'under the provisions of sections 1 to 7' of the Sherman Act." Pet. Br. 15 (emphasis added and omitted). Surely, if Congress had intended to adopt petitioners' reading, which significantly changes the longstanding approach to Sherman Act coverage, it would have used the phrase "give[]

rise to *the plaintiff's* claim." *Kruman*, 284 F.3d at 400. Accord *Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting).

Second, the introduction to the FTAIA provides that the Sherman Act "appl[ies]" to a conspiracy "unless," rather than "to the extent that," the conditions set forth in Clauses 1 and 2 are met. Petitioners acknowledge that their position "would subject the same 'unitary' conduct [*i.e.*, their conspiracy] to U.S. antitrust regulation in some cases and not in others, depending on whether the plaintiff's claim arose from an injury to U.S. commerce or an injury to foreign commerce" (Br. 18-19), a result at odds with the plain text. Cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) (contrasting "to the extent" with "if," and concluding that conflating the two would be "at odds with the plain language").

Third, Clause 2 refers to a "claim under sections 1 to 7 of this Act," *i.e.*, a claim under the Sherman Act. If Congress intended to limit the right of particular parties to sue, it more naturally would have adopted a standing provision that, like the proviso, specifically addresses the plaintiff's injury. See *Kruman*, 284 F.3d at 396. Alternatively, Congress would have amended, or at least referenced, the Clayton Act. A plaintiff "has standing to enforce § 1 by virtue of § 4 of the Clayton Act." *Jefferson Parish Hosp. No. 1* v. *Hyde*, 466 U.S. 2, 5 n.1 (1984). But "[t]he FTAIA did not amend the Clayton Act." U.S. Br. 27.[22]

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[22] For example, Congress amended the Clayton Act to codify this Court's holding in *Pfizer* that foreign governments may sue under the Sherman Act, albeit for actual, not treble, damages. See 15 U.S.C. 15(b). And the several subsequent proposed bills that would have limited private plaintiffs' standing and remedies in foreign commerce cases have each been framed as amendments to the Clayton Act. See Foreign Trade Antitrust Improvements Act of 1985, S. 397, 99th Cong. (1985); Foreign Trade Antitrust Improvements Act of 1986, S. 2164, 99th Cong. (1986); Foreign Trade Antitrust Improvements Act of 1989, S. 50, 101st Cong. (1989). The provisions of these other bills, unlike the FTAIA, would "not be applicable to actions instituted by United States antitrust enforcement agencies." *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Comm. on the Judiciary* (Hearings on S. 397), 99th Cong. 215 n.30 (1985) (A.B.A. Section of Antitrust Law Report on S. 397).

B. The House Report On Which Petitioners Rely Confirms That Congress Intended To Preserve The Claims Of Overseas Purchasers.

Petitioners' legislative history argument is premised on the FTAIA House Report. This reliance is misguided.

1. First, the House Report cannot provide sound support for petitioners' reading, because, when it was drafted, the *original* Clause 2 required that the effect on U.S. commerce be "the basis of the violation alleged." App., *infra*, 3a. In its *final* form, the statute instead requires simply that the U.S. effect "give rise to a claim" under the Sherman Act. As discussed in the preceding section, this language was adopted precisely to avoid the very implication petitioners now press. The final version clearly supports respondents' view, as indicated by floor statements of its sponsors after the change was made. See 128 Cong. Rec. 18,953 (1982) (Rep. Rodino) (FTAIA "retains full protection for *any person* injured by conduct that has a direct, substantial, and reasonably foreseeable *anticompetitive* effect on the domestic or import commerce of the United States" (emphases added)); *id.* at 27,385 (1982) (Rep. McClory) ("[FTAIA] place[s] jurisdictional limits on these laws so that they will not apply to our *export trade or to purely foreign trade* unless the conduct in question has a 'direct, substantial, and reasonably foreseeable' *anticompetitive* effect on our domestic commerce or on the commerce of exporters in the United States." (emphases added)).

2. Second, portions of the Report that petitioners omit demonstrate that even the *former* version of the statute did not support their view. First, the Report explains that "[a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction." App., *infra*, 22a. Petitioners' position also cannot be reconciled with the Report's explanation that Clause 2 was added in response to the A.B.A.'s comments to adopt the *National Bank of Canada* rule. See *supra* at 27. Nor is their construction consistent with the Report's repeated statements, starting with its very first sentence, that the FTAIA's sole purpose was "to promote American exports." App. *infra*, 4a.

Equally important, petitioners' position conflicts with the House Report's express adoption of *Pfizer*'s deterrence rationale. See 434 U.S. at 308; see also *supra* at 15. According to the House Report, Congress determined to "preserv[e] the rights of foreign persons to sue under our laws when the conduct in question has a *substantial nexus* to this country" (not merely when it occurs *in* this country) because – as this "Court pointed out in *Pfizer*" – the failure to do so could "so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." App., *infra*, 17a (emphasis added). Congress thereby embraced the conclusion "that *foreign plaintiffs* should have *full rights* under United States antitrust laws where the challenged conduct affected domestic and foreign markets indiscriminately." WALLER, *supra*, § 9:9, at 9-26 to 27 (emphasis added).

3. Even the three snippets petitioners extract from the House Report in context undermine their reading and demonstrate that not even the original version of Clause 2 required that the plaintiff's injury arise in U.S. commerce.

First, petitioners quote the Report's statement, tracking the bill's language at the time, that the domestic "'effect' providing the jurisdictional nexus" serves as "the basis for the injury alleged." Br. 34. But the full quote reads:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from *conduct with no anticompetitive effects in the domestic marketplace*. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States*, or, in the case of conduct lacking such an impact, on an export opportunity of a person doing business in the United States.

App., *infra*, 19a-20a (emphases added). Thus, the Report's reference to "the basis for the injury alleged" simply mimics the bill as it stood at the time, and "does not speak to the issue whether the particular plaintiff bringing the suit must have suffered an injury caused by the domestic anticompetitive effects of the conduct." *Kruman*, 284 F.3d at 400 n.8.

Next, petitioners quote a reference to the protections afforded to foreign purchasers "'in the domestic marketplace,'" contending that this means foreign purchasers are only protected if their injuries are "sustained in U.S. commerce." Br. 35 (quoting House Report at 10; App., *infra*, 17a). In fact, the full quote states:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws conduct that does not have the requisite domestic effects. This test, however, *does not exclude all persons injured abroad* from recovering under the antitrust laws of the United States. A *course of conduct in the United States – e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers *take title abroad or suffer economic injury abroad*. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

App., *infra*, 17a (emphases added and omitted and citations omitted). The Report's reference to "the protection of our antitrust laws *in the domestic marketplace*" merely reflects the fact that the hypothetical being addressed by this passage concerns "[a] course of conduct *in the United States*." The full quote cannot support petitioners' inference that foreign plaintiffs are protected *only* "in the domestic marketplace" in other contexts – to the contrary, it makes clear that foreign plaintiffs are covered even if they "take title abroad or suffer economic injury abroad."

Finally, petitioners repeatedly invoke the phrase "wholly foreign transactions" in isolation (Br. 13, 33, 40) to offer a meaning that the full text refutes. The full quote states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to "export" trade, and substitutes phrases such as "other than import" trade. It is thus clear that wholly foreign transactions, as well as export transactions are covered by the amendment, but that import transactions are not.

Br. App. 16a (emphasis added). This passage explains why the drafters extended the FTAIA's limitation on Sherman Act jurisdiction to "wholly foreign" commerce in addition to export commerce, distinguishing the Sherman Act's application to import commerce. And the quote's references to "transactions" means not individual retail *sales*, as petitioners suppose, but the *anticompetitive agreements* alleged to be unlawful. See *ibid* (citing as an example of a "wholly foreign transaction" the facts of *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (CADC 1968), in which two shippers entered into a conspiracy to exclude competitors). But in any event, the Report merely states that the FTAIA *applies* to wholly foreign transactions such that jurisdiction exists if Clauses 1 and 2 are satisfied, not (as petitioners would have it) that the FTAIA *excludes* them from the coverage of the Sherman Act.[23]

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[23] Petitioners' drive-by constitutional challenges are equally meritless. Congress's Foreign Commerce power extends to even wholly overseas conduct that is intended to affect, and does in fact affect, the U.S.; moreover, the scope of its commerce power turns on the *activity* regulated, not on which *plaintiffs* are challenging it. *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911). And not even petitioners' novel due process claim would lie here, for due process is satisfied if the defendants' conduct had foreseeable effects on U.S. commerce. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1245-48 (1992).

IV. As Direct Victims Of Petitioners' Worldwide Cartel, Respondents Have Suffered "Antitrust Injury" And Have "Antitrust Standing."

The question whether respondents satisfy the prudential "antitrust injury" and "antitrust standing" doctrines is entirely derivative of the question whether the Sherman Act applies to their claims. See *Den Norske*, 241 F.3d at 431 n.32. The anticompetitive conduct that is subject to the private right of action under the antitrust laws is co-extensive with the conduct that is subject to criminal prosecution. "As the courts have often noted, * * * the selfsame language of the Sherman Act provides for both criminal and civil sanctions, and for the full array of these penalties." 2 AREEDA ET AL., *supra*, ¶ 303a. The Clayton Act, in conferring a right to sue upon "*any* person injured by reason of anything forbidden in the antitrust laws" (15 U.S.C. 15(a) (emphasis added)), manifestly does not contemplate that *no* person would have the right to remedy acts that are illegal under the Sherman Act. Rather, the antitrust injury and standing doctrines seek to enhance the deterrent effect of the antitrust laws by identifying efficient antitrust enforcers.

Overseas direct purchasers are the *only* enforcers of the antitrust laws who may bring a claim challenging the illegal overseas acts of a worldwide cartel: U.S. *indirect* purchasers were not directly injured by the conspirators' sales, while all the U.S. *competitors* that otherwise might sue are, in fact, *co-conspirators*. Petitioners' argument would, for the first time, convert doctrines intended to identify the most efficient enforcers of the antitrust laws into a rule forbidding *any* enforcers from challenging patently unlawful activity. Such a perverse result has no basis in either law or logic, and any meritorious concerns petitioners raise regarding the scope of this litigation are instead properly resolved through doctrines such as comity, conflict of laws, and *forum non conveniens* that, as we have discussed, are not now before this Court.

A. Respondents Have Antitrust Standing Even Under Petitioners' Proposed Standards.

This case does not present an appropriate occasion to decide whether existing standing doctrine should be modified as petitioners propose. First, for the reasons described in Part I, *supra*, respondents' claims do, in fact, arise from the effects of petitioners' cartel on U.S. commerce. In sum, petitioners' fixing of U.S. prices, as well as their global market-division scheme, were critical to maintaining the cartel overseas. Had petitioners *not* included the U.S. in their cartel, respondents would have been able to purchase vitamins at competitive prices, and the cartel would have collapsed due to arbitrage. Petitioners' activities in the U.S. are thus the direct cause of respondents' injuries.

Second, reiterating that the antitrust laws are intended to protect U.S. consumers, petitioners suggest that standing should be limited to those claims that will further U.S. interests. Br. 43-45. Petitioners continue to "confuse[] the ultimate purposes of the antitrust laws with the question of who can invoke their remedies. The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations." *Pfizer*, 434 U.S. at 314.

As we have explained, in the case of global cartels, foreign purchasers' claims further U.S. interests. When a cartel is operating simultaneously here and abroad, the United States will benefit directly from the destruction of the cartel elsewhere, as arbitrage will allow U.S. purchasers to escape super-competitive U.S. cartel prices. And indeed, claims by foreign purchasers prevent cartel activity in the U.S.: if a cartel in a global market cannot operate worldwide, it will collapse. Furthermore, as this Court concluded in *Pfizer*, claims by foreign purchasers deter cartels from subsidizing the risks of liability in this country with their profits abroad. See *supra* at 13-19.

Pfizer itself notably held that the foreign plaintiffs in that case suffered "antitrust injury" and had standing. 434 U.S. at 315. And *Pfizer*, when applied to cartels, necessarily means that persons injured here and abroad may sue. As the A.B.A.'s International Law Section wrote in its resolution supporting the

FTAIA, "Because the antitrust laws would be fully applicable to such conduct, a plaintiff would retain the right to recover all damages caused by the effects of the restrictive conduct; *whether those effects fell within or without the United States.* As a result, there would be no incentive for a firm to offset domestic liability for restraints impinging on domestic commerce by engaging in coordinated conduct abroad." Hearings on H.R. 2326, *supra*, at 255 (emphasis added).

B. Petitioners' Proposed Standing Rule Is Inconsistent With This Court's Precedents And Congress's Intent.

1. Respondents Satisfy The Settled Requirements For Antitrust Standing.

Petitioners contend that their standing rule can be derived from this Court's statement in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), that antitrust injury is injury "'that flow[s] from that which makes defendants' acts unlawful.'" Br. 44. But as *Brunswick* and its progeny make clear, what makes actionable conduct "unlawful" is that it is anti-, not pro-, competitive; this Court has never suggested that standing turns on whether the injury arose from an effect on U.S. commerce. *Brunswick*, 429 U.S. at 489. See also, *e.g.*, *Atl. Richfield Co.* v. *USA Petro. Co.*, 495 U.S. 328, 338 (1990); *Cargill, Inc.* v. *Monfort*, 479 U.S. 104, 116 (1986). In this case, respondents unquestionably were injured by the anti-competitive effects of petitioners' conduct – namely, the super-competitive prices imposed by the unlawful cartel.

Indeed, the most analogous precedents of this Court reject petitioners' contention that a plaintiff's injury must arise from an effect on U.S. commerce. Petitioners argue that "[r]espondents' own injuries were not caused 'by reason of' an agreement in restraint of commerce 'among' the several states or 'with' foreign nations." Br. 42 (quoting 15 U.S.C. 1). That is simply not correct: the agreement that injured respondents – petitioners' *conspiracy* – indisputably operated in U.S. domestic and foreign commerce. There is no requirement that a plaintiff's *injury itself* arise from an effect on U.S. commerce. The logical consequence of petitioners' argument would be that a plaintiff's injury must arise from an effect on inter-, rather than intra-, state com-

merce, for the Sherman Act applies only to agreements affecting the former. See 1A AREEDA ET AL., *supra*, ¶ 273b (noting that the effects test "is not different in principle" from the "'affecting commerce' test for domestic jurisdiction"). This Court has rejected any such suggestion, however, instead permitting claims arising from wholly *intrastate* injury so long as the challenged conduct *also* has substantial interstate effects. See, *e.g.*, *Summit Health*, 500 U.S. at 330 (rejecting as irrelevant defendant's contention that "there is no factual nexus between the restraint on [plaintiff's local medical practice] and interstate commerce"); *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 242, 246 (1980).

Petitioners also invoke the "antitrust standing" factors identified in *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 543 (1983). At bottom, the question is whether the plaintiff is an efficient enforcer of the antitrust laws, or instead asserts an injury that is too remote from the unlawful conduct. Relevant considerations include the directness of the injury suffered; whether it is speculative; judicial manageability; and the potential for multiple recoveries. *Ibid.* These factors do not support eliminating the recognition of foreign direct purchasers' non-speculative claims against a worldwide cartel, even if, as petitioners suggest, they may limit foreign claims in *other* international antitrust contexts. The United States thus seemingly concedes that respondents' claims "suffer none of the defects mentioned in *Associated General Contractors*." U.S. Br. 29 n.9.

When, as here, foreign and domestic customers suffer an identical injury from a single, integrated course of conduct, none of the *Associated General Contractors* considerations is implicated. Respondents' claims are not "remote," "indirect," or "speculative." See 459 U.S. at 543. And contrary to petitioners' hyperbolic assertions, respondents' claims present no prospect of an unmanageable drain on judicial resources. Respondents filed this suit as a companion case to the indistinguishable claims of plaintiffs who purchased vitamins for delivery in this country. The unlawful act – petitioners' conspiracy – is precisely the same in both cases. The plaintiffs' relationship to the petitioners – direct purchaser – is likewise identical. There is

furthermore a great overlap in the discovery to be undertaken; indeed, the overwhelming majority of the evidence necessary to establish the defendants' liability has already been collected. And in a cartel case such as this, respondents' claims require no special inquiry into foreign economic conditions or law, because the defendants engaged in "*per se* [antitrust violations]: market division, * * * consumer allocation, production limitations, and price fixing or price stabilization." 1 HAWK, *supra*, at 286 (Supp. 1996-1) (emphasis added).[24]

All told, foreign purchasers have brought suit against only a half-dozen cartels.[25] Each paralleled a federal prosecution that found the defendants' conduct – here *and abroad* – unlawful. And these claims have generally proceeded in tandem with the pending "domestic" claims.

The subtext of petitioners' argument is instead that this case will involve a great *many* plaintiffs. See, *e.g.*, Br. 44. That, of course, is entirely petitioners' own doing. They engaged in a gigantic scheme to bilk their customers out of billions of dollars and now hope to minimize the resulting liability. As this Court indicated in *Pfizer*, it is precisely the grandness of an illegal scheme like petitioners' that requires the firm application of the jurisdiction conferred in the Sherman Act. It is not a viable argument that *this case* is unmanageable, for some amount of

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[24] Compare Br. 27-28 (hypothesizing *other*, non-cartel cases involving "novel claims," disputes over "whether agreements directed at different countries constitute multiple narrow conspiracies or one broad conspiracy," and claims "where the challenged restraint is not a 'per se' violation [unlike] price-fixing"); U.S. Br. 23 (hypothesizing non-cartel claims involving disputes over "whether the challenged foreign conduct was part of some global conspiracy, whether that global conspiracy had the requisite effects on domestic commerce, and whether some third person was injured in United States commerce in such a way that gave rise to a claim").

[25] In addition to this case, *Kruman* (auction houses), and *Den Norske* (heavy-lift barges), respondents are aware of three other cartel cases: *Newco Trading Co.* v. *Ajinomoto Co., Inc. et al.*, No. 03-CV-8217 (S.D.N.Y.) (monosodium glutamate); *Latinoquimici-Amtex S.A.* v. *Akzo Nobel Chems. B.V.*, No. 03-CV-10312 (S.D.N.Y.) (sodium monochloroacetate); and *Ferromin Int'l Trade Corp.* v. *Ucar Int'l, Inc.*, C.A. No. 99-693 (E.D. Pa.) (graphite electrodes).

complex litigation is the inevitable consequence of the U.S.'s central role in an increasingly global economy, and established litigation devices such as class action procedures minimize the burden on our courts. This Court, in any event, has already concluded that manageability alone is not a ground for denying antitrust standing to persons, such as respondents, whose claims "promote the vigorous enforcement of the antitrust laws." *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 214 (1990).

Indeed, petitioners' antitrust standing argument would *unravel* the doctrines this Court has crafted to preserve judicial manageability and effective antitrust enforcement. Petitioners' sales injured indirect purchasers in the United States, *i.e.*, purchasers of finished products that were manufactured overseas using cartelized vitamins. "[V]itamins manufacturers sell most of their output in dry powder form, eventually to be used for human and animal nutritional purposes in a wide variety of products, from vitamin pills, to feed for chicken, beef, and fish, to nutritional enrichment in numerous food products." Harry First, *The Vitamins Case*, 68 ANTITRUST L.J. 711, 712 (2001). Those finished products necessarily bore higher prices, because the cartel inflated the costs those manufacturers incurred for an important ingredient.

Such U.S. indirect purchasers are currently prohibited from bringing claims on the theory that a more efficient enforcer exists: namely, the direct purchasers. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-38 (1977). But if foreign direct purchasers' claims were forbidden, the injury to U.S. indirect purchasers who buy from them would stand without remedy, permitting violators to "retain the fruits of their illegality." *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). The resulting gap in the deterrent function of antitrust remedies could be filled only by a ruling that the *Illinois Brick* doctrine does not apply to indirect purchasers' claims if the direct purchasers are overseas. But *that* approach – which would permit U.S. indirect purchasers to bring claims – would be genuinely unmanageable,

requiring U.S. plaintiffs to prove the effects of an illegal cartel on each of the imported products they purchased.[26]

2. Congress Declined To Adopt The Restriction On Standing That Petitioners Propose.

Petitioners' proposed standing rule mirrors their theory of FTAIA jurisdiction; as explained *supra*, however, Congress squarely rejected such an approach. This case thus does not present a gap that Congress has left this Court to fill by changing the law of antitrust standing. The right of persons injured overseas to sue under our antitrust laws is a question that Congress has carefully considered. And it would be nonsensical to conclude that Congress in the FTAIA decided to preserve Sherman Act jurisdiction over claims by foreign purchasers for injuries cartels cause overseas, but simultaneously intended to eliminate those claims on standing grounds.[27]

a. Petitioners have not identified *any* pre-FTAIA decision of *any* court, and respondents are aware of none, holding that a person lacks standing merely because his injury did not arise from the effect of a Sherman Act violation on U.S. commerce. Instead, petitioners attempt to put the shoe on respondents' foot, asserting that, "[a]s of the time Congress enacted the FTAIA, no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce." Br. 9. This assertion is wrong, for at the time Congress enacted the FTAIA, there had been several such cases.

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[26] Petitioners' suggestion that this case presents a third-party, or "derivative," standing problem (Br. 15-16) is not correct. Respondents' claims are based solely on their *own* injuries. Nor would courts, to determine the existence of jurisdiction, be required to adjudicate the merits of some hypothetical third party's claims. As we showed in Part III, *supra*, the requirement that the conduct give rise to "a claim" simply limits the Sherman Act to conduct causing anti-competitive effects in the United States – effects petitioners concede.

[27] To be clear, standing is not coextensive with Sherman Act coverage. Many foreign purchasers' claims would be excluded by this Court's traditional antitrust standing and injury doctrines: *e.g.*, speculative claims, claims by foreign indirect purchasers, and claims not arising from the defendant's anticompetitive actions.

Indeed, petitioners *themselves* cite such a case, and acknowledge that it is discussed in the House Report. In *Industria Siciliana Asfalti, Bitumi, S.p.A.* v. *Exxon Research & Engineering Co.*, No. 75-5828-CSH, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977) (cited in Br. 31 n.7 and House Report at 5 (App., *infra*, 9a)), the plaintiffs were permitted to pursue a claim for injury "confined to Italy" and arising from an Italian contract. The court explained that

> the fact that the plaintiff's injury in this case has materialized in a foreign country, and been borne by a foreign corporation which does not directly engage in import from or export to the United States, is not a sufficient ground upon which to deny it antitrust protection. * * * [T]he foreign plaintiff is not without standing to cite the deleterious domestic effects in support of his own antitrust complaint.

Id. at *30-*31. See also, *e.g.*, *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (CA2), cert. denied, 434 U.S. 984 (1977) (defendants conspired to prevent plaintiff, an oil producer in Libya, from securing Libyan government contracts); *Dominicus Americana Bohio* v. *Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979) (plaintiffs, mostly foreign corporations alleging no U.S. injury, had standing to challenge defendants' monopolization of tourist facilities in the Dominican Republic).[28]

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[28] Petitioners cite this Court's decision in *Matsushita*, *supra*, as supposedly holding that "private plaintiffs challenging [a] multinational conspiracy can seek redress only for injuries that occur 'in the American market.'" Br. 43 (quoting *Matsushita*, 475 U.S. at 584 n.7). In fact, the quoted phrase makes a factual, not legal, point: the plaintiffs in that case (U.S. electronics manufacturers) only claimed to suffer an antitrust injury "in the American market." The Court held that plaintiffs were required to prove that defendants "conspired to price predatorily in the American market" because the other behavior that they alleged (including some conduct in Japan), although anti-competitive, did not harm them. 475 U.S. at 584 n.7. *Matsushita* thus imposed no geographic requirement for standing. To the contrary, had the plaintiffs competed in Japan and been harmed by defendant's exclusionary behavior there, they clearly *would* have had standing, for they would have been injured in U.S. export commerce as a result of their inability to sell their goods abroad. See *Zenith*, 395 U.S. at 124-25.

b. Against the background of this case law, it is apparent that petitioners' point that "Congress made clear that it did 'not intend to alter existing concepts of antitrust injury or antitrust standing'" (Br. 42 (quoting House Report, at 11 (App., *infra*, 18a))) actually supports *respondents'* view: Congress preserved established law providing that foreign purchasers *could* sue for their overseas injuries. Congress expressly focused on the question of standing when it adopted the proviso, overruling cases that gave standing to foreign purchasers in cases involving only U.S. export commerce. The proviso's failure to cover non-export cases shows that Congress intended to preserve standing in such cases. Indeed, Congress *rejected* proposals that would have extended the proviso's limit on standing to non-export cases like this one. See *supra* at 28 & n.21.

After the FTAIA was enacted, Congress repeatedly revisited the same issue, and in each instance declined to change established standing law. Shortly after adopting the FTAIA, Congress amended the standing provision of the Clayton Act to codify this Court's holding in *Pfizer* that foreign governments may sue under the antitrust laws (albeit for single, not treble, damages). The amended statute imposed no limitation on where the injury must arise. 15 U.S.C. 15(b). And subsequently, Congress has considered the remedies available to private parties in international antitrust cases, but it has never even *considered* eliminating standing entirely for plaintiffs like respondents. And Congress has rejected even the more limited proposals.[29]

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[29] For example, the Foreign Trade Antitrust Improvements Act of 1985 would have amended the Clayton Act to require courts to apply the "jurisdictional rule of reason" in foreign competition cases. See Hearings on S. 397, *supra*. If a particular suit violated that standard, courts would have been required to award only single damages or, conceivably, dismiss the case. S. 397, *supra*, §§ 3, 4 (1985). Similar legislation was introduced in 1986 and 1989. S. 2164, Foreign Trade Antitrust Improvements Act of 1986, 99th Cong. (1986); S. 50, Foreign Trade Antitrust Improvements Act of 1989, 101st Cong. (1989). The Reagan Administration successfully *opposed* efforts to limit the treble-damages remedy in international cartel cases on the ground that such claims were essential to preserving the Sherman Act's deterrent effect. Hearings on S. 397, *supra*, at 22 (Charles F. Rule, Acting Ass't

V. The Other Arguments Of Petitioners' *Amici* Lack Merit.

Petitioners' *amici* finally urge this Court to narrowly construe the FTAIA for two reasons entirely extraneous to either the text or history of the statute: (i) to ensure the effectiveness of the government's leniency program; (ii) to preserve international comity. Both arguments lack merit.

A. The Government's Leniency Program Is Not A Justification for Misinterpreting the FTAIA.

The government asserts that permitting the claims of all cartel victims will discourage participation in its leniency program. U.S. Br. 19-21. This cannot inform this Court's construction of the FTAIA, for this leniency program has existed only "[s]ince 1993" (U.S. Br. 19), and thus could hardly have informed Congress's decisions respecting the FTAIA's scope more than a decade earlier. The government's contention is thus merely a bald policy overture, ungrounded in the FTAIA or any other statute. We address the matter briefly to show that for several reasons, the policy the government now espouses is a bad one.[30]

First, Congress is addressing the government's concern, but in a much more targeted way than the government's blunderbuss proposal here. The Senate Judiciary Committee has favorably reported an Administration-sponsored bill, the Antitrust Criminal Penalty Enforcement and Reform Act of 2003, which will greatly increase the penalties for Sherman Act violations but limit plaintiffs to actual damages with respect to those *particular defendants* that participate in the leniency program. H.R. 1086, tit. II, § 213(a), 108th Cong. (2003). The government's proposal here, by contrast, is both under- and over-inclusive. It would fail to immunize companies participating in the leniency pro-

A.G.); *id.* at 306 (James C. Miller, FTC Chairman); *id.* at 40 (Abraham Sofaer, Legal Adviser, U.S. Dep't of State).

[30] The government's citation (U.S. Br. 21) to *United States* v. *Borden Co.*, 347 U.S. 514 (1954), for the proposition that Congress intended the government to be the principal antitrust enforcer is simply misleading, for it ignores this Court's *conclusion* in *Borden* that "private and public actions were designed to be cumulative, not mutually exclusive," such that both forms of antitrust enforcement "may proceed simultaneously or in disregard of each other." *Id.* at 519.

gram from treble-damage liability for harms to U.S. consumers. But it would immunize cartel participants who do *not* participate in the leniency program. And it equally impugns the *foreign* private remedies the government now touts. *E.g.*, U.S. Br. 25.

Second, the government's argument is self-destructive – if accepted, it would undermine the leniency program. Most important, as already discussed, the FTAIA defines the *scope* of the Sherman Act and, as such, applies equally to prosecutors. If petitioners' position were correct, cartel activity abroad would be immune even from *injunctive* relief in a criminal enforcement action by the government. The contrary assumption, underlying the government's entire brief, that Clause 2 merely governs the standing of private parties to sue (see, *e.g.*, U.S. Br. 8 ("The FTAIA governs whether a federal court may hear *a plaintiff's complaint* alleging violations of the Sherman Act." (emphasis added)) is absolutely wrong. The FTAIA applies equally to "Sherman Act suits by the Department of Justice and private parties." App., *infra*, 14a. Indeed, Congress enacted the FTAIA to "provide assurances against private plaintiff[s] successfully proposing different standards than those employed by the Department of Justice." *Id.* 6a. See also S. CONF. REP. NO. 97-644, at 29-30 (1982) (FTAIA enacts "a jurisdictional threshold for enforcement actions"). When conduct does not satisfy the FTAIA's requirements, "private litigants have no right to recover damages under the Sherman Act, and the FTC and Justice Department are barred from bringing a civil or criminal action." John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 364 (1983). Thus, by exempting foreign cartel participants from liability in the U.S., the government's position would actually weaken its own leniency program, as such participants would have less to fear from U.S. prosecutors and would be even less inclined to apply.[31]

[31] Petitioners' reading of the FTAIA would equally undercut the deterrent value of the criminal fines imposed under U.S. law. Although petitioners' extensive presence in this country made it possible to base their fines on their domestic sales, the government has steadfastly maintained that "a court may consider the defendant's worldwide (U.S.

Furthermore, civil suits play a crucial role in cartel detection and deterrence. In this case, for example, "Class Plaintiffs uncovered the alleged conduct among bulk vitamins producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing." Order, *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, at 5 (Feb. 18, 2004). The same holds true generally: "*Many more violations* are likely to be detected if private parties have an interest in doing so than if government agencies, with their meager budgets, shoulder the burden alone." MIROW & MAURER, *supra*, at 226 (emphasis added) . The government's own experience shows that "cartel members did not fear detection by U.S. or foreign antitrust authorities. In fact, they literally laughed at the very idea of it." Scott D. Hammond, Dir. Of Crim. Enf., Speech of Sept. 12, 2000, at 8. The government has seen "over and over" the "contempt and utter disregard that the members of the cartel typically have for antitrust enforcement." James M. Griffin, Dep. Ass't A.G., Speech of Apr. 6, 2000, at 6.[32]

Third, the government has repeatedly rejected the very argument it advances here, maintaining that civil liability does not discourage participation in this program because reduced criminal exposure provides all the incentive that is needed. Applicants typically save hundreds of millions of dollars in fines (between $800 million and $2.1 billion for lead petitioner Hoffmann-La Roche, for example) and – perhaps most important – avoid jail time. See James M. Griffin, Speech of Aug. 12, 2003,

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and foreign) sales in the calculation when the amount of U.S. commerce affected * * * understates * * * the impact of the defendant's conduct on American businesses and consumers." DOJ ICPAC Final Report, *supra*, at 169 n.24. But if petitioners' reading were accepted, a cartel's overseas activity would be *lawful* under the Sherman Act and therefore presumably could not form the basis of any criminal fine.

[32] This case is a perfect illustration. The lead petitioner brazenly continued its central role in this cartel even after pleading guilty to participating in a worldwide citric acid cartel. "Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel." Hammond, Dir. of Crim. Enf., Speech of Sept. 12, 2000.

at 8; Scott D. Hammond, Dir. of Crim. Enf., Speech of Mar. 8, 2001, at 8; *Interview with* [Dep. Ass't A.G.] *Gary Spratling*, *supra*, at 11; Gary Spratling, *Cartel Roundtable, The Architects of Enforcement*, 6 GLOBAL COMPETITION REV. 25 (2003).

B. The Exercise Of Jurisdiction Over A Worldwide Cartel Does Not Offend Comity.

We explained *supra* at 6 that this case does not present the question whether this or any other international antitrust case should be dismissed on comity grounds, for comity was never invoked nor addressed in the lower courts. Although petitioners' *amici* press the issue, their arguments establish that this case raises *no* substantial issue of comity because – as petitioners effectively concede (Br. 23) – cartels are uniformly condemned by international competition laws. "For decades, there were vigorous disputes in international fora about whether it made sense to prohibit cartel behavior by private firms. That debate has been resolved, in this country and elsewhere." R. Hewitt Pate, Acting Ass't A.G., Speech of May 16, 2003, at 2. For example, the U.N. Conference on Trade and Development and OECD condemn hard-core cartels. DOJ ICPAC Final Report, *supra*, 185.[33]

For that reason, invocations of comity here are substantially weaker than those unsuccessfully advanced by the defendants in *Hartford Fire*. In that case, the defendants' conduct – which took place entirely in the U.K. – was "perfectly consistent with British law and policy" (509 U.S. at 799); on that basis, four Justices dissented (*id.* at 819-21 (Scalia, J., dissenting)). Here, by contrast, cartel activity is broadly condemned.

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[33] Without elaboration, petitioners assert that in *McCulloch* v. *Sociedad Nacional de Marineos de Honduras*, 372 U.S. 10 (1963), *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1958), and *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), "differences in sovereign policies regarding available remedies prompted the Court to construe the federal statutes as inapplicable." Br. 22. But these cases do not address differences in *remedies* for illegal conduct; rather, they address a concern specific to maritime law, namely the need to protect shippers from constantly changing *substantive legal obligations* as the ships pass through foreign waters. These cases simply apply the long-established rule that the law of a ship's flag state governs the legal duties of those aboard toward one another.

Petitioners' argument is furthermore surpassingly overbroad. Rather than allowing for the case-specific application of comity concerns, petitioners would redefine the scope of the Sherman Act *across the board* just because in *some* cases the antitrust laws apply to *some* activities simultaneously regulated by *some* other nations. Petitioners' jurisdictional exclusion would apply to U.S. defendants (including those in this case) no less than foreign ones, even though only the latter raise comity concerns. Furthermore, any comity concerns with respect to the great many states that have anti-cartel laws but do not enforce them (see *supra* at 17 & n.14) are overborne by the unprecedented and illogical gap in antitrust enforcement petitioners would create. Whatever the result under doctrines such as comity, conflict of laws, and *forum non conveniens* with respect to claims that involve sales in countries that provide effective class-based private rights of action, the ongoing emergence of competition policies overseas cannot be said to have broadly abrogated the settled "effects" principle as petitioners propose.

But even limited to its own terms, petitioners' argument merely demonstrates the existence of *overlapping* jurisdiction over their cartel – a common phenomenon – not a conflict that precludes exercising Sherman Act jurisdiction. "Exercise of jurisdiction by more than one state may be reasonable – for example, * * * when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory * * *." RESTATEMENT § 403 cmt. d. The right to exercise jurisdiction is limited to one nation only in a narrow circumstance: "only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible." *Id.* § 403 cmt. e. Overlapping jurisdictional regimes are also a valuable tool for deterring cartel behavior: "multiple enforcers create a higher probability of detection, successful investigation, and a complete package of punishment that reflects the global effects of the unlawful conduct." Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 135-36 (2000).

With respect to this case specifically, the exercise of U.S. antitrust jurisdiction over petitioners' cartel is clearly reasonable and comports with comity. "Any agreement in restraint of United States trade that is made outside the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce." RESTATEMENT § 415(2). As noted, the United States purchases more bulk vitamins than any other nation. And in the parallel suits brought by domestic purchasers, petitioners have admitted to conducting numerous meetings in the United States in furtherance of their conspiracy.[34]

Indeed, not only are cartels uniformly condemned in international law, but the U.S. "effects" principle has gained widespread acceptance in the cartel context. RESTATEMENT § 402, rptrs. notes ("This basis for jurisdiction is increasingly accepted for regulation of restrictive business practices, particularly in the European Community * * *."). "When there is the most blatant form of conspiracy in restraint of trade, a horizontal price-fixing agreement between competitors, the antitrust regimes of the world are united in the view that it does not matter that the smoke-filled rooms where the plots are hatched are abroad." Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 28 (1999). For example, E.U. officials may "recommend fines up to 10 percent of a violator's *global*

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[34] That this case does not offend comity is also illustrated by the government's prosecution of petitioners for their conduct here and abroad. "In applying the principle of reasonableness, the exercise of *criminal* (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as *particularly* intrusive." RESTATEMENT § 403 rprts. notes (emphases added); see also *id.* cmt. f. The fact that the U.S. government determined both that petitioners overseas activities fell within the scope of the Sherman Act (apparently recognizing the intertwined nature of the global vitamins market) and also that the exercise of jurisdiction over petitioners' cartel would not offend comity is thus a strong indication that this civil suit is equally appropriate.

annual sales in all its product lines." CONNOR, *supra*, at 85 (emphasis added).

Also instructive is the British High Court's decision in *Provimi* v. *Aventis Animal Nutrition SA*, [2003] E.C.C. 29. Appearing here as an *amicus*, the U.K. describes *Provimi* as a case in which "[p]ersons *injured* by the vitamin cartel *in the United Kingdom* were allowed to sue British subsidiaries in the UK courts for private damages." U.K. Br. 4 (emphases added). In fact, as explained by the current Assistant Attorney General for Antitrust, the claims in *Provimi* were "made on behalf of a German subsidiary that purchased vitamins from a German subsidiary of one of the cartel members," and the High Court "ruled that plaintiffs could sue a U.K. subsidiary of the defendant cartel member for the damages alleged to have been suffered in Germany, even though the damages relate to trade with the German subsidiary of the defendant." Pate, Acting Ass't A.G., Speech of May 16, 2003, at 13. And the Deputy Head of the E.C.'s Competition Directorate explains that "the English court, like the Court of Appeals for the District of Columbia Circuit [in this case], granted jurisdiction for an injury suffered *outside its territory*." Woods, *supra*, at 8 (emphasis added).

The substance of the comity arguments advanced by petitioners' *amici* is thus directed not at the exercise of Sherman Act jurisdiction over worldwide cartels, but instead at the extraterritorial exercise of jurisdiction over other forms of anti-competitive conduct abroad, such as monopolies, mergers, and allegations of unfair trade practices. See, *e.g.*, Pet. Br. 23 ("Although price-fixing is widely proscribed, *other* commercial activities that may be prohibited under U.S. law may be permissible under foreign law." (emphasis added)). In those other contexts, where international norms and standards differ, comity principles may have substantial force. They have none in the case of worldwide cartels, which are condemned in essentially every jurisdiction. RESTATEMENT § 415, cmt. e.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 15, 2004

APPENDIX

STATUTES

1. Section 1 of the Sherman Act (15 U.S.C. 1) provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982 (15 U.S.C. 6a) provides in relevant part:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act (15 U.S.C. 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

97TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
NO. 97-686

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982

AUGUST 2, 1982. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 5285]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5235) to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to exclude from the application of such Acts certain conduct involving exports, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce), with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

"(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

"(2) such effect is the basis of the violation alleged under this Act. [page 2]

If this Act applies to such conduct only because of the operation of paragraph (1) (B), then this Act shall apply to such conduct only for injury to export business in the United States.".

AMENDMENT TO CLAYTON ACT

SEC. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following undesignated paragraph:

"This section shall not apply to the formation or operation of any joint ventured limited to commerce, other than import commerce, with foreign nations.".

AMENDMENT TO FEDERAL TRADE COMMISSION ACT

SEC. 4 Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect is the basis of the violation alleged under this subsection. If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.".

Amend the title so as toread:

A bill to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to exclude from the application of such Acts certain conduct involving trade with foreign nations.

I. PURPOSE

H.R. 5235 is one of several bills introduced in the 97th Congress that seek to promote American exports. A number of considerations provide the basis for this legislation. First is the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services. Second, courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. H.R. 5235 addresses these problems of perception and definition by clarifying the Sherman Act and the antitrust proscriptions of the Federal Trade Commission Act to make explicit their application only to conduct having a "direct,

substantial, and reasonably foreseeable effect" on domestic commerce or domestic exports. The bill will also clarify Section 7 of the Clayton Act to make explicit its inapplicability to the promotion and operation of export and foreign joint ventures.

Passage of H.R. 5235 will not be a panacea for the many problems that may be afflicting American export trade. Assertions that the antitrust laws have had any significant negative impact on exports are at best speculative. Nonetheless, H.R. 5235 will achieve several objectives. First, H.R. 5235 will encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services. Second, enactment of a single, objective test—the "direct, substantial, and reasonably foreseeable effect" test—will serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards. A clear [page 3] benchmark will exist for businessmen, attorneys and judges as well as our trading partners.

II. SUMMARY OF THE REPORTED BILL

H.R. 5235, as reported, contains four sections. Section 1 sets forth the short title: the "Foreign Trade Antitrust Improvements Act of 1982." Section 2 amends the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, by adding a new Section 7 that makes the Sherman Act inapplicable to conduct involving trade or commerce with foreign nations, other than import transactions, unless there is a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or the export opportunities of a domestic person. Section 3 amends Section 7 of the Clayton Act, 15 U.S.C. § 18, to make it inapplicable to the formation or operation of joint ventures limited to commerce with foreign nations, other than import commerce. Section 4 amends the antitrust (*i.e.*, unfair methods of competition) aspect of Section 5 (a) of the Federal Trade Act, 15 U.S.C. § 45 (a), to conform to Section 5 of the FTC Act to the Sherman Act amendment contained in Section 2 of H.R. 5235.

III. Background

A. Procedural History of H.R. 5235

On March 4, 1981, Chairman Rodino and Congressman McClory introduced H.R. 2326, the Foreign Trade Antitrust Improvements Act of 1981, the forerunner of H.R. 5235. The bill was referred to the Committee on the Judiciary, and, in turn, to the Subcommittee on Monopolies and Commercial Law.

The Subcommittee held three days of hearings on the international application of the United States' antitrust laws, H.R. 2326, and related bills. Testifying on March 26, 1981, were Malcolm Baldridge, Secretary of Commerce; Professor Eleanor M. Fox of the New York University School of Law; Mr. A. Paul Victor of the law firm of Weil, Gotshal & Manges; Mr. David N. Goldsweig, an attorney experienced in international antitrust issues, practicing with the General Motors Corp.; and Professor James A. Rahl, Owen L. Coon, Professor of Law at Northwestern University. Testifying on April 8, 1981, were Mr. John H. Shenefield of the law firm of Milbank, Tweed, Hadley & McCloy and a former Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice; Mr. James R. Atwood of the law firm of Covington & Burling and former Deputy Assistant Secretary and Deputy Legal Adviser in the United States Department of State; and Mr. Martin F. Connor, Washington Corporate Counsel of the General Electric Co., who testified on behalf of the Business Roundtable. Finally, testifying on June 24, 1981, were Gordon O. F. Johnson, Chairman, LogEtronics, Inc.; Mr. Thomas M. Rees, a former Member of Congress and an attorney familiar with export issues; and Mr. Fred Emery, a former Director of the Federal Register.

On December 10, 1981, the Subcommittee unanimously approved an amendment to H.R. 2326 in the nature of a substitute, which was introduced as H.R. 5235, cosponsored by all twelve Members of the Sub-[page 4]committee. On May 18, 1982, by

unanimous voice vote, the full Committee reported H.R. 5235 with an amendment in the nature of a substitute.

B. Need for Legislation

1. Business perception that antitrust laws prohibit legitimate joint activity

Some testimony in the hearing record suggests that the United States is doing well as an exporter and that whatever problems that might exist are not caused by our antitrust laws. *See e.g.*, Prepared statement of Professor James A. Rahl, dated March 26, 1981 ("Rahl Statement"), at 3–4.

This view is borne out by a July 1980 report to the Congress prepared by the Office of the United States Trade Representative and the Department of Commerce. The report found that the three government policies that most discourage United States exports are taxation of Americans employed abroad, uncertainties about enforcement of the Foreign Corrupt Practices Act, and export control regulations. The Report specifically stated that while antitrust laws were of concern of businessmen. "No specific instances were shown of these laws unduly restricting exports." Professor Rahl testified that, far from hindering our export efforts, American antitrust laws have been a major factor in ridding the world of many international cartels and enhancing domestic competition, both factors in improving our overall export performance. Rahl Statement at 7–9.

There is, however, evidence that a perception exists among businessmen, especially small businessmen, that antitrust law prohibits efficiency-enhancing joint export activities. For example, Secretary Baldridge testified that antitrust assurances were necessary to encourage small- and middle-sized exporters to increase their exports. Prepared Statement of Honorable Malcolm Baldrige, dated March 26, 1981, ("Baldrige Statement"), at 5–7; Hearing Transcript of March 26, 1981, at 44–45. Professor Fox, Mr. Victor, Mr. Goldsweig and Mr. Shenefield also acknowledged a perception of the

antirust laws as a hindrance in joint export activities. Hearing Transcript of March 26,1981, at 51, 57; Prepared Statement of Professor Eleanor M. Fox, dated March 26, 1981 ('Fox Statement"), at 2–3; Prepared Statement of Mr. A. Paul Victor, dated March 26, 1981 ("Victor Statement"), at 3–4; Prepared Statement of Mr. David N. Goldsweig, dated March 26, 1981 ("Goldsweig Statement"), at 2; Prepared Statement of Mr. John H. Shenefield, dated April 8, 1981 ("Shenefield Statement"), at 1–2. As Mr. Shenefield stated, "[i]t is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States. Specifically, it is believed that the antitrust laws hinder our export performance. . . ." Shenefield Statement at 1–2. And the Section of Antitrust Law of the American Bar Association mentions the "*perception* of some American businessmen that the United States antitrust laws prohibit certain exporting activities. . . ." American Bar Association, Section of Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading*, dated October 26, 1981 ("Antitrust Section Report") at 22 (emphasis in original). [page 5]

2. *Uncertainty in the Verbal Formulation of the Nature and Quantum of Effects That Are Necessary To Create Jurisdiction Under the Antitrust Laws*

The hearing record suggests a second, related problem—possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction. Since Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.[1] There remains, however, some disparity among

[1] *See Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.* 344 U.S. 280 (1952).

judicial interpretations and between those interpretations and executive enforcement policy regarding the quantum and nature of the effects required to create jurisdiction.

Alcoa itself contemplated a test based upon whether the international transaction was intended to affect domestic commerce and whether it actually did so. 148 F.2d at 443–44. Following the lead of *Alcoa* and its subsequent judicial interpretations, the Department of Justice announced its view in 1977 that the United States antitrust laws should be applicable to an international transaction "when there is a substantial and foreseeable effect on the United States commerce," and that it would be a miscarriage of Congressional intent to apply the Sherman Act to "foreign activities which have no direct or intended effect on United States consumers or export opportunities. . . ." United States Department of Justice, Antitrust Division, *Antitrust Guide to International Operations* 6–7 (1977).

Recently, however, in private actions under the antitrust laws, the courts have arrived at different formulations of the nature and quantum of "effects" needed. For example, in *Todhunter-Mitchell & Co.* v. *Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1074), the court looked to whether the conduct "directly affect[s] the flow of foreign commerce into or out of this country". In *Waldbaum* v. *Worldvision Enterprises, Inc.*, 1978–2 Trade Case (CCH) Para. 62,378, at 76,257 (S.D.N.Y. 1978), the court asked whether there were "anticompetitive effects in the United States. . . ." In *Industria Siciliana Asfalti, Bitumi, S.P.A.* v. *Exxon Research & Engineering Co., et al.*, 1977–1 Trade Cas. (CCH) Para. 61,256, at 70,784 (S.D.N.Y. 1977), the court required a showing of an "impact upon United States commerce." And, in *Dominious Americana Bohio* v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979), the court stated that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimus*." See also *Timberland Lumber Co.* 1. *Bank of America, N.T. & S .A.*, 549 F.2d 613 (9th Cir. 1976); *Mannington Mills,*

Inc. v. *Congoleum Corp.*, 595 F.2d 1287, 1291–92 (3rd Cir. 1979); *National Bank of Canada* v. *Interbank Card Ass'n.*, 666 F.2d 6, 8 (2d. Cir. 1981).

The precise effect of these varying formulations is disputed. Some commentators believe there are few, if any, differences in the results. An ABA Antitrust Section analysis has concluded that, despite the variations in wording, "there is, with rare exception, no *significant* [page 6] inconsistency between judicial precedents and the Justice Department's view of the effects test." Antitrust Section Report at 10 (emphasis in original).

Other commentators view the matter differently. For example, the Business Roundtable believes that "[j]udicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction." Prepared Statement of Mr. Martin F. Connor, dated April 8, 1981 ("Roundtable Statement"), at 6–7; *see* Goldsweig Statement at 2–6. The Roundtable goes on to note that "[t]he commentators are also divided on the correct test to apply. . . ." *Id.* at 7.

The Committee need not choose between these competing views to conclude that legislative clarification is appropriate. First, as a practical matter, businessmen and antitrust practitioners often consider American antitrust law an unnecessarily complicating factor in a fluid environment in which prompt decisionmaking may be critical. As the Business Roundtable has stated, "antitrust considerations typically enter the picture long before a business transaction is explored in depth. If these considerations indicate problems, the possible transaction may die on the drawing board well before negotiations are commenced." Roundtable Statement at 6; *see* Baldridge Statement at 6. A single, clear standard can reduce the amount of legal research and analysis that will be necessary to make an accurate

prediction to whether United States antitrust laws "indicate problems."

Second, even if different formulations have not led to divergent results, the possibility of divergence in results certainly exists. Presumably a *de minimus* standard creates a lower threshold than a "substantial effects" test. Indeed, in some cases a different result might not only be possible but compelled. Businessmen and antitrust counsel cannot safely ignore the current differences in formulation. *See* Goldsweig Statement at 4. H.R. 5235 will provide assurances against private plaintiff's successfully proposing different standards than those employed by the Department of Justice.

Finally, at a time when international trade plays an immense and increasingly important role in the economy, it is appropriate for Congress to formulate a standard to be applied uniformly throughout the federal judicial system. A single standard will allow consistent precedent to develop by providing more definite touchstones to guide the parties and the courts. As the Business Roundtable has concluded, "no legitimate purpose is served by perpetuating uncertainty on this fundamental question."

CONGRESSIONAL RESPONSE

Over the past few years, public debate has focused on two approaches for removing uncertainty that may now exist concerning the jurisdiction of the United States antitrust laws. The first, embodied in various export trading company bills such as S. 734, H.R. 1648 and H.R. 1799 as introduced, contemplates an amendment to the Webb Pomerene Act, 15 U.S.C. §§ 61, *et seq.*, to provide a procedure whereby persons seeking to engage in joint export activity would apply to the Department of Commerce for antitrust certification. The Department, after inter-[page 7]agency consultation with the Department of Justice and the Federal Trade Commission, would issue applicants a certificate that purports to exempt designated joint activities from the antitrust laws. During the Subcommittee hearing process,

many of the witnesses criticized these "certification" proposals as excessively bureaucratic, ineffective, and even counterproductive. On July 27, 1982, the House passed H.R. 1799 with Committee amendments so that the bill does not amend the Pomerene Act and creates a certificate procedure in the Department of Justice. See. H.R. Rep. 97–637, pt. 2.

The second approach, a straightforward clarification of the antitrust laws, was originally embodied in H.R. 2326. H.R. 2326 contained only two substantive sections. The first provided that the Sherman Act "shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation." The second section provided that Section 7 of the Clatyon Act "shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation."

As Chairman Rodino stated in introducing the bill, H.R. 2326 would allow "American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace. . . . [T]he uncertainty of antitrust constraints has remained a strong concern of potential exporters; that concern is remedied by this bill." 127 Cong. Rec. H. 779 (daily ed. March 4, 1981). Mr. McClory, a co-author of this legislation, explained that H.R. 2326

> squarely addresses the complaint voiced by American exporters and potential exporters that their actions are inhibited by uncertainty regarding the scope and effect of our antitrust laws, and it does so without a bureaucratic apparatus which would confer antitrust immunity at an uncertain cost in Government redtape and possible anticompetitive domestic effects. By clarifying the law, it will especially help those

> small- and medium-size businesses which many are convinced have the greatest potential for making a significant contribution to the volume of our export trade.
>
> * * * * * * *
>
> This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace, and it should also help to deter unjustified private and government actions against exporters. (*Id.*)

The specific purpose of the Sherman Act modification is:

> to more clearly establish when antitrust liability attaches to international business activities. The Sherman Act prohibits restraints of trade or commerce with foreign nations. [*See, e.g.*, Sections 1 & 2, 15 U.S.C. §§ 1 & 2, which apply to "trade or commerce among the several States or with foreign nations."] This bill will establish that restraints on export trade [page 8] only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or a domestic firm competing for foreign trade. ((*Id.*) (Remarks of Chairman Rodino).)

The modifications to Section 7 of the Clayton Act are necessary because:

> The Supreme Court has held that Section 7 of the Clayton Act applies to joint ventures when the participants form a separate corporation and purchase the new venture's stock. Section 7 prohibits acquisitions that may substantially lessen competition and attacks potentially anticompetitive market concentration in its incipiency. Businessmen must, therefore, exercise caution when forming such ventures. This bill would exempt joint ventures that are limited to export trading.
>
> This does not mean that export-related joint ventures are

free of all antitrust restrictions. They remain subject to the Sherman Act, but the stringent "incipiency" standard of section 7 would not apply. (*Id.*)

D. EVOLUTION OF H.R. 2326 TO H.R. 5235

During and after the hearings on H.R. 2326, a number of experts, after expressing strong support for its basic concepts, suggested improvements. As a result, the Subcommittee and the Committee made changes in the bill, the most important of which are discussed below.

1. Inclusion of the Federal Trade Commission

Several witnesses pointed out that, although H.R. 2326 would provide assurances against Sherman Act suits by the Department of Justice and private parties, it supplied no similar protection against actions brought by the Federal Trade Commission. Fox Statement at 6; Goldsweig Statement at 9–10; Shenefield Statement at 9; Roundtable Statement at 10–11. The amendment in the nature of a substitute that the Subcommittee approved in December, 1981, included a new section that made a change in Section 5(a) of the Federal Trade Commission Act parallel to that made in the Sherman Act. The Subcommittee amendment alters only the antitrust coverage of Section 5(a) of the FTC Act; the consumer protection jurisdiction of Section 5(a) is left untouched.

2. Addition of the requirement that effects "reasonably foreseeable"

Some witnesses and commentators also suggested the need to alter H.R. 2326 to make clear that the effects upon domestic commerce or a domestic export opportunity must be foreseeable:

> A significant source of business uncertainty when engaging in foreign commerce is the possibility that an unpredictable, remote or indirect impact on U.S. commerce, determined after the fact, could result in a firm being subjected to U.S. antitrust jurisdiction. The Justice Department in its *Antitrust Guide* takes the position that only "foreseeable" effects

> on U.S. commerce should result in U.S. antitrust jurisdiction. *Accord, United States* v. *Aluminum Company of America,* 148 F.2d 416, 444 (2d. Cir. 1945) (Goldsweig Statement at [page 9] 11; *see* Shenefield Statement at 10; Roundtable Statement at 12–13).

Because the ultimate purpose of this legislation is to promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions, the Subcommittee amendment makes explicit that the effect on domestic commerce or export opportunities must be "reasonably foreseeable." The Subcommittee chose a formulation based on *foreseeability* rather than *intent* to make the standard an objective one and to avoid—at least at the jurisdictional stage—inquiries into the actual, subjective motives of defendants. An intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result.

The objective nature of the jurisdictional test is also evident from use of the term "reasonably," which was added through an amendment of Mr. Butler. "Reasonably" connotes not only objectivity, but practicality as well. The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown.

This provision should free businessmen and their advisors from having to worry unduly about effects that are highly unlikely, but it does not permit them effectively to turn from the reasonably foreseeable consequences of their actions.

Once the effects of a course of conduct are felt, the test remains an objective one, but a defendant confronted with evidence that his past conduct has had direct and substantial effects within this country could not argue that continued effects of this type flowing from similar future conduct were not "reasonably foreseeable."

3. Imports and Purely Foreign Transactions

Some observers raised questions about the status of import transactions under H.R. 2326 and urged the Subcommittee to make clear that the legislation had no effect on the application of antitrust laws to imports. As Mr. Atwood stated, "it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." Prepared Statement of Mr. James R. Atwood, dated April 8, 1981. ("Atwood Statement"), at 14; *see* Rahl Statement at 10; Antitrust Section Report at 31. To remove any possible doubt, the Subcommittee amendment (H.R. 5235, as introduced) modified the legislation to make clear that it applied only to "export" trade.

The desirability of another change soon became apparent. The Subcommittee's "export" commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. *See, e.g., Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect [page 10] on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to "export" trade, and substitutes phrases such as "other than import" trade. It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.

With these changes, H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting

antitrust regulation. When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors. To be sure, if the foreign state in question has an antitrust regimen, American-owned firms must still comply. But no longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership.

4. Conduct Having a Foreign Impact

The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al* v. *Government of India, et al*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations.

There are other reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer*, *supra*, 434 U.S. at 314–315, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.

While H.R. 5235 preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality or the situs of the business, a different result will obtain when the conduct is solely export-oriented. Thus, a price-fixing conspiracy directed solely to exported products or services, absent a spillover effect on the domestic marketplace (see pt. E(2), *infra*), would normally not have the requisite effects on domestic or import commerce. Foreign buyers injured by such export conduct would have to seek recourse in their home courts.

If such solely export-oriented conduct affects export commerce of another person doing business in the United States, both the Sherman and FTC Act amendments preserve jurisdiction insofar as there is injury to that person. Thus, a domestic exporter is assured a remedy [page 11] under our antitrust laws for injury caused by unlawful conduct of a competing United States exporter. But a foreign firm whose non-domestic operations were injured by the very same export oriented conduct would have no remedy under our antitrust laws. This result is assured by the Committee's inclusion of the final sentence in the Sherman and FTC Act amendments. It limits recovery for conduct that has no requisite domestic effects, other than the effects on the export commerce of another person doing business in the United States, to such person.

5. *Type of Domestic Impact*

As explained more fully (see pt. E(1), *infra*), in providing that the federal courts may assert the jurisdiction of the United States antitrust laws if conduct affects the export trade or export commerce "of a person engaged in such trade or commerce in the United States," the Committee does not intend to alter existing concepts of antitrust injury or antitrust standing. This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged.

For example, the mere fact that an exporter may be adversely affected in a financial sense by the activities of another would not necessarily man that he has sustained an injury for which he may recover under Section 4 of the Clayton Act. *See*, e.g., *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

For similar reasons, the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. *See*, e.g., *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981). For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by providing a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

According to the International Law Section of the American Bar Association, the legislation as reported by the Subcommittee, before amendment by the Committee, could have been read as ignoring

> whether conduct has an adverse effect on competition. This result not only departs from the weight of scholarly opinion, but would produce perverse results. Under such an interpretation, conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which has a neutral or procompetitive domestic effect would be subject to the antitrust laws. (American Bar Association, Section of International Law, *Report on Purposes and Provisions of H.R. 5235*, at 9.)

The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act

amend[page 12]ments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an impact, on an export opportunity of a person doing business in the United States.

6. *Clayton Act Amendments*

Some comments in the record suggest that the original amendment to Section 7 of the Clayton Act, as expressed in H.R. 2326, was susceptible to misinterpretation. As originally drafted, the amendment applied to "joint ventures limited solely to export trading. . . ." The concerns raised about this language centered on, first, whether the parents of the joint ventures would be included in the exemption; second, whether incidental activities necessary to engage in joint export activities would be covered by the exemption; and finally, whether export joint ventures that themselves entered into mergers or acquisitions might not be unintentionally exempted from the proscriptions of Section 7. *See* Antitrust Section Report at 32–33; Roundtable Statement at 17–18; Atwood Statement at 18.

The Committee amendment, which states that Section 7 of the Clayton Act "shall not apply to the formation or operation of any joint venture . . .", is intended to address all these concerns. First, by making clear that it is the *conduct* of *forming* and *operating* the joint venture and not the joint venture itself that is protected, the amendment removes any disparity between the joint venture and its parents and makes plain that joint ventures that engage in merger activity that joint ventures that engage in merger activity are not exempted are not exempted by the amendment. Second, by making clear that the operation of the joint venture falls within the amendment, and not merely

the exporting or foreign activity itself, the amendment affords protection to the incidental activities of the joint venture. In order to be exempted from Section 7 of the Clayton Act, however, the incidental activities must have a strong and direct relationship to the primary export or foreign activity.

The full Committee corrected another potential problem with the Subcommittee version of the Section 7 amendment, which was limited to joint ventures involved solely in export commerce. As reported by the full Committee, the amendment applies to commerce with foreign nations, other than import commerce. Thus, joint ventures involved solely with export commerce, or other forms of foreign commerce with no import nexus to the United States, will be outside the coverage of Section 7 of the Clayton Act. For example, a joint venture could not only export goods from the United States, but also produce or market goods in foreign nations, and still enjoy the exemption from the incipiency standard of the Clayton Act.

E. OTHER ISSUES

During the proceedings on H.R. 5235, two other significant issues were raised, which the Committee did not feel necessitated changes in the legislation. [page 13]

1. *Effect of Legislation and Current Law*

A very important question is the effect of the legislation on current antitrust law. It is the intent of the sponsors of the legislation and the Committee to address only the subject matter jurisdiction of United States antitrust law in this legislation. H.R. 5235 does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged.

Moreover, the bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the

courts' ability to employ notions of comity, *see*. e.g., *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 1287 (3rd Cir. 1979), or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist or to the extraterritorial pursuit of evidence in appropriate cases. *See* Atwood Statement at 7 n. 7.

2. *International Cartels*

Probably the most important criticism of the legislative concept of H.R. 5235 came from Professor Rahl, who feared the legislation could be misinterpreted as a legislative approval for American firms to engage in the type of international cartel activity prevalent before World War II:

> [P]erhaps most unfortunate of all is the risk that this provision would encourage American firms not only to form cartels among themselves but to participate in foreign and international cartels. . . . Past experience indicates that a serious risk would then arise of a secret agreement to include the United States in the market allocation to round things out. (Rahl Statement at 11.)

The Committee, after weighing this and similar arguments carefully, does not believe the legislation will result in a rejuvenation of international cartels. Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce. The Committee would expect the Department of Justice and the Federal Trade Commission to continue their vigilance concerning cartel activity and to use their enforcement powers appropriately.

In addition, the Committee recognized the increased sensitivity of other nations to antitrust considerations and cartel activity. By more precisely defining the subject matter jurisdiction of U.S. antitrust law, H.R. 5235 in no way limits the ability of a foreign sovereign to [page14] act under its own laws against an American-based export cartel having unlawful effects in its territory. Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets. *See* Atwood Statement at 6–8.

IV. The Provisions of H.R. 5235

H.R. 5235, the Foreign Trade Antitrust Improvements Act of 1982, contains three substantive provisions that amend the Sherman Act, Section 7 of the Clayton Act and the antitrust aspects of Section 5(a) of the Federal Trade Commission Act to clarify the limits of these provisions in reaching certain export and foreign activities.

Section 1 of H.R. 5235 states the short title. Section 2 amends the Sherman Act, 15 U.S.C. § 1, *et seq.*, by adding a new Section 7 to the Sherman Act. The intent of the new Section 7 is to establish that the proscriptions of the Sherman Act do not apply to export or purely foreign commerce unless the conduct has a direct, substantial and reasonably foreseeable anticompetitive effect on domestic or import commerce, or a domestic export opportunity.

Section 3 of H.R. 5235 amends Section 7 of the Clayton Act, 15 U.S.C. § 18, to exempt the formation and operation of joint ventures limited to export or purely foreign trade. This Section is intended only to remove the "incipiency" standard of Section 7 of the Clayton Act.

Section 4 amends the Federal Trade Commission Act to make it clear that the antitrust proscriptions of Section 5(a), 15 U.S.C. 45 (a), apply only to methods of competition that have a direct, substantial and reasonably foreseeable effect on domestic or import commerce, or

a domestic export opportunity. This amendment is intended to parallel the Sherman Act amendment. As noted above, this amendment does not affect the FTC's consumer protection jurisdiction.

V. Information Submitted Pursuant to Rules

1. *Budget Statement*

Clause 2(1) (3) (B) of House Rules XI is inapplicable because this legislation does not provide new budgetary authority or increased expenditures.

2. *Cost Estimate*

The Committee concurs with the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee for the purpose of clause 7(a) of House Rule XIII. Pursuant to clause 2(1)(3)(C) of House Rule XI, set out is the estimate of the Director of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., May 27, 1982.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5235, the Foreign Trade Antitrust Improvements Act of 1982, [page 15] as ordered reported by the House Committee on the Judiciary, May 18, 1982.

The bill amends the Sherman, Clayton, and Federal Trade Commission Acts in restating or limiting the extraterritorial reach of the U.S. antitrust laws. It is expected that no significant additional cost to the government will be insurred as a result of enactment of this legislation.

Sincerely,
Alice M. Rivlin, *Director.*

3. *Inflationary Impact Statement*

Pursuant to clause 2(1)(4) of House Rule XI, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

4. *Oversight Findings*

The Subcommittee on Monopolies and Commercial law of this Committee exercises oversight responsibilities with respect to the antitrust laws. The favorable consideration of this bill was recommended by the Subcommittee. The Subcommittee will monitor developments under this legislation.

No findings or recommendations of the Committee on Government Operations were received as referred to in House Rule XI, clause 2(1) (3) (D).

VI. Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

Sherman Act

* * * * * * *

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce), with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and [page 16]

(2) such effect is the basis of the violation alleged under this Act.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

****

SECTION 7 OF THE CLAYTON ACT

SEC. 7. That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the

effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired. [page 17]

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transaction duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

This section shall not apply to the formation or operation of any joint venture limited to commerce, other than import commerce, with foreign nations.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Sec. 5. (a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect is the basis of the violation alleged under this subsection.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

* * * * * * *

[page 18]

ADDITIONAL VIEWS OF CHAIRMAN RODINO

I intend to offer H.R. 5235 under suspension of the House Rules with one minor clarification in Sections 2 and 4, which amend the Sherman and FTC Acts. The reported version requires that the effect upon domestic commerce or domestic export opportunity be "the basis of the violation alleged. . . ." As explained more fully in the Committee's Report, the Committee added this language to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect.

I believe that it is possible to improve the language of the Committee's version by substituting the phrase "such effect gives rise to a claim" under the provisions of the Sherman or FTC Act. The substituted language accomplishes the same result as the Committee version and is better, in my view, because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation.

PETER W. RODINO.

(25)

No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The statement required by Rule 29.6 has been provided in the petition for writ of certiorari, as modified by the brief for petitioners, and remains accurate.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
I. THE U.S. ANTITRUST LAWS PROVIDE NO REMEDY FOR RESPONDENTS' INJURIES	4
II. RESPONDENTS CITE NO PRECEDENT SUGGESTING THAT PURELY FOREIGN INJURIES ARE ACTIONABLE UNDER U.S. ANTITRUST LAW	7
III. RESPONDENTS' FOREIGN INJURIES FALL OUTSIDE THE SCOPE OF U.S. ANTITRUST LAW WHETHER OR NOT THERE WAS A "WORLDWIDE" MARKET FOR VITAMINS	10
IV. PERMITTING ANTITRUST CLAIMS FOR INJURIES SUSTAINED OUTSIDE U.S. COMMERCE WOULD NOT ENHANCE DETERRENCE	12
V. THE FTAIA AFFIRMATIVELY BARS RESPONDENTS' CLAIMS	13
VI. RESPONDENTS' POSITION WOULD IMPOSE SERIOUS JUDICIAL BURDENS AND GENERATE INTERNATIONAL DISCORD	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

	Page
Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	6
Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002)	17
Dominicus Americana Bohio v. Gulf & Western Industries, 473 F. Supp. 680 (S.D.N.Y. 1979)	8
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	11
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)	14-15
Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977)	8
Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co., No. 75 Civ. 5828-CSH, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977)	8
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	5, 7, 9
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)	5
National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981)	15-16
Nixon v. Missouri Mun. League, 541 U.S. __, No. 02-1238, 72 U.S.L.W. 4256 (Mar. 24, 2004)	16
Pfizer Inc. v. Government of India, 434 U.S. 308 (1978)	9
Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991)	7

TABLE OF AUTHORITIES—Continued

	Page
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)	8
United States v. American Tobacco Co., 221 U.S. 106 (1911)	7-8
United States v. Craft, 535 U.S. 274 (2002)	17
United States v. National Lead Co., 332 U.S. 319 (1947)	8

STATUTES

15 U.S.C. § 1	2, 5
15 U.S.C. § 2	2, 5
15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982)	5, 14, 15, 18

LEGISLATIVE HISTORY

128 Cong. Rec. H4982 (daily ed. Aug. 3, 1982)	15
H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487	9, 13, 14, 19
Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2826 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong. (1981)	17

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' brief fails to come to grips with petitioners' showing, endorsed by the United States and seven of this country's allies and trading partners, that the decision of the court of appeals is contrary to the core purposes of the Sherman and Clayton Acts and conflicts with the most natural reading of the FTAIA. Nor do respondents seriously dispute the Government's showing that their position will harm the welfare of American consumers by frustrating detection of international price-fixing cartels, discouraging foreign co-operation necessary for effective enforcement and imposing staggering new burdens on the federal district courts. And respondents have failed to explain how their position can be reconciled with the rule of construction, frequently applied by this Court, that disfavors broad statutory interpretations that would unreasonably project federal legislation into the internal affairs of other nations.

Respondents' brief instead is devoted largely to establishing propositions that petitioners do not contest: that U.S. antitrust laws prohibit cartel activity that affects U.S. commerce, and that the U.S. Government can sue to enjoin (and criminally prosecute) such activity wherever it occurs. It is also undisputed that participants in U.S. commerce, including foreign nationals, may recover damages under U.S. antitrust law for injuries they sustain from the effects of cartel activity on U.S. commerce. What *is* disputed is respondents' extraordinary contention that U.S. law provides a remedy for every injury in the world caused by such cartel activity. That contention finds no support in the Sherman Act, the Clayton Act, the FTAIA or any ruling of this Court.

Respondents charge that petitioners seek "a dramatic change in the law" (Br. 9), but it is respondents who advocate an unprecedented extension of U.S. antitrust law to govern

purely foreign commerce. The exclusive concern of U.S. antitrust law is U.S. commerce. The Sherman Act prescribes rules to prevent harms to U.S. domestic and U.S. foreign (*i.e.*, export and import) commerce, and the Clayton Act furnishes a remedy for injuries that result from *those* harms. No precedent of this Court supports respondents' invocation of *that* remedy to redress injuries that result from other, purely foreign harms. Indeed, respondents acknowledged in the district court that they sought a novel expansion of U.S. law. Pet. App. 52a.

The purportedly "worldwide" scope of the market for vitamins (Resp. Br. 10) does not make every vitamin purchase a concern of the United States or warrant converting the federal courts into "world courts" for competition disputes from around the globe. The jurisdictional reach of the federal antitrust laws is delimited in terms not of markets, which are defined by economic factors rather than sovereign boundaries, but of *commerce*: "commerce among the several States, or with foreign nations." *E.g.*, 15 U.S.C. §§ 1, 2. Congress did not attempt to regulate commerce within or among foreign nations. And because U.S. commerce consists of transactions, the question whether the antitrust laws apply in any given case necessarily turns on whether or not the transactions at issue are part of U.S. commerce.

Respondents purchased vitamins in foreign countries in purely foreign transactions. Those transactions fall outside the scope of U.S. commerce—and thus outside the scope of U.S. antitrust law—whether or not there is a "global" market for vitamins. Respondents' speculative assertion that, absent price-fixing in the United States, they might have avoided injury by purchasing vitamins here (Br. 11-12) does not turn their foreign purchases into U.S. transactions. Nor does it matter that their foreign injuries may share features in common with compensable injuries of others (*id.* at 38-39). U.S. law provides no remedy for injuries sustained in transactions that occur outside U.S. commerce. This conclusion

comports with the established rule, ignored by respondents, that federal law should be construed to avoid discord with foreign nations, many of which have declined to adopt U.S. litigation procedures and remedies in devising competition policies for their own economies. Every foreign nation that has participated in these proceedings has argued against respondents' position.

The Department of Justice and Federal Trade Commission reject respondents' claim that U.S. consumers would benefit if respondents were permitted to sue under U.S. law. The Government has explained (Br. 19-21) that respondents' position would seriously impair enforcement by discouraging participation in amnesty programs that are critical to the detection of cartels. But even if, as respondents argue, imposing U.S. treble damages liability for injuries sustained outside U.S. commerce might further deter cartels, existing law does not impose liability for such foreign injury.

The FTAIA reinforces these conclusions. It codifies the longstanding principle that it is the effects of anticompetitive conduct on U.S. commerce that justify application of U.S. law to foreign activity. Respondents argue (Br. 20) that the FTAIA does not apply to this case, claiming that it applies exclusively to U.S. export commerce, but they made no such argument below and cite no case to support this claim. This about-face is particularly notable given that the court of appeals relied on the FTAIA in ruling that respondents can assert U.S. antitrust claims. Pet. App. 4a. The FTAIA does apply to this case and affirmatively bars respondents' claims through its requirement that a U.S. effect must "give rise to" the claim of the plaintiff before the court—a restriction that incorporates the requirements for private claims under the Sherman and Clayton Acts, which do not permit recovery for purely foreign injury.

I. THE U.S. ANTITRUST LAWS PROVIDE NO REMEDY FOR RESPONDENTS' INJURIES.

Respondents are foreign entities that purchased vitamins in foreign countries from foreign sellers for delivery outside the United States. Those purchases were not part of U.S. domestic or U.S. foreign commerce. Respondents complain that the overcharges they paid in these foreign transactions resulted from agreements to fix the prices of vitamins on a worldwide basis, but whatever the scope of the conduct or the market, the fact remains that their injuries were caused by non-competitive conditions existing in the foreign countries where their purchases took place. Such injuries are not actionable under U.S. antitrust law.[1]

Respondents do not explain how injuries sustained outside U.S. commerce fit into the private remedial scheme created by the Sherman and Clayton Acts. They do not rely on the FTAIA, as the court of appeals did below, as the source of their right to sue. Indeed, they contend (Br. 19) that the FTAIA has no application to this case. They argue that the Sherman Act prohibits cartels that affect the United States (*id.* at 7-8), that U.S. consumers would benefit from holding petitioners liable for foreign injuries (*id.* at 13-19) and that this Court's "antitrust standing" precedents such as *Illinois Brick* and *Brunswick* do not expressly bar their claims (*id.* at 37-41). But none of these arguments identifies the source of their entitlement to sue. Respondents' assertion that they were injured by the cartel's effect on prices in the United States, which (they say) prevented them from buying vitamins here

[1] Respondents incorrectly state (Br. 2 & n.2) that the claims of several foreign and domestic Procter & Gamble ("P&G") companies that were briefly parties to this case are being "held in abeyance." The claims of the foreign P&G companies were dismissed by the district court on the same grounds as respondents' claims (Pet. App. 52a), and that dismissal was not appealed. The claims of the domestic P&G companies were (at the district court's suggestion) dropped from this case and pursued in a separate lawsuit that has since been settled. *Id.* at 8a, 57a.

at competitive prices (*id.* at 11-12), is untenable. The only injury they allege is monetary loss for purchases actually made (J.A. 62), not the "lost opportunity" of hypothetical transactions that were never attempted.

Respondents' foreign injuries are the province of foreign competition law. Their claims are, in the Government's phrase, "strikingly localized to foreign countries." U.S. Br. 12. Respondents cannot invoke the private damages remedy created by the Sherman and Clayton Acts because that remedy does not exist for their benefit. United States antitrust laws "do not regulate the competitive conditions of other nations' economies" (*Matsushita*, 475 U.S. at 582), and they afford no remedy to persons injured by the breakdown of competition in other nations' commerce.

Congress expressly defined the domain of the Sherman Act. Section 1 prohibits agreements "in restraint of trade or commerce *among* the several States, or *with* foreign nations." 15 U.S.C. § 1 (emphasis added). Section 2 similarly prohibits monopolization of U.S. commerce. § 2. The Sherman Act protects the trade and commerce of the United States, *not* the trade and commerce of foreign nations, and thus reaches conduct abroad "only when the conduct has an effect on American commerce." *Matsushita*, 475 U.S. at 583 n.6. Section 4 of the Clayton Act provides a private right to recover treble damages for injuries sustained "by reason of" the anticompetitive conduct prohibited by the Sherman Act. It confers a private remedy for injuries resulting from harms to U.S. commerce, *not* harms to purely foreign commerce. The FTAIA's requirement that a party's claim arise from an effect on U.S. commerce reflects this basic jurisdictional framework. That reading of the antitrust statutes comports with this Court's longstanding reluctance to construe federal law so as to create "the possibility of international discord" in the absence of clear congressional intent. *McCulloch*, 372 U.S. at 21-22.

This is not to say that foreign persons are barred from complaining of injuries sustained in U.S. commerce. Nor must a plaintiff be injured *inside* the territorial boundaries of the United States. What is essential is that the plaintiff's injury result from harm to U.S. commerce, which occurs when the plaintiff was injured as a party to a transaction in U.S. commerce or was wrongfully excluded from U.S. commerce. A foreign manufacturer prevented from selling products in the United States would thus have a valid claim, despite being foreign and located outside the United States.[2]

It makes no difference that respondents allege they were injured by a "worldwide conspiracy." That characterization does not alter the fact that respondents' injuries were sustained in foreign commerce. The effects of anticompetitive conduct on foreign commerce, and any overcharges respondents may have paid, are of no concern to U.S. law, whether or not the "same" conduct caused harm both here and abroad. No precedent of this Court suggests otherwise. See *infra*, p. 7-9. Respondents' remedies are those prescribed by the relevant foreign nations in regulating their own commerce.

Respondents' argument that they have "antitrust standing" because they are direct purchasers and complain of anticompetitive effects (Br. 35-37) does not address the fact that the remedy respondents seek—damages for injuries caused by the restraint of foreign commerce—is one that Section 4 does not provide. The antitrust standing requirements of cases such as *Illinois Brick* and *Brunswick* narrow the broad class of persons injured by a restraint of U.S. commerce who might otherwise be entitled to sue under Section 4. *Associated Gen. Contractors*, 459 U.S. at 534. Respondents do not fall within that broad class of participants

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[2] Respondents wrongly state that the Government "concedes" that a plaintiff does not need to be injured "*in* U.S. commerce." Resp. Br. 12. What the Government instead stated, in keeping with the above, is that an injury need not "occur[] *in the United States*." U.S. Br. 11 n.3.

in U.S. commerce. Their claims are improper, *not* because they fail the prudential requirements of this Court's "antitrust standing" cases—although they do fail them (see Pet. Br. 43-45)—but because Section 4 provides no remedy for injuries sustained outside U.S. commerce.[3]

II. RESPONDENTS CITE NO PRECEDENT SUGGESTING THAT PURELY FOREIGN INJURIES ARE ACTIONABLE UNDER U.S. ANTITRUST LAW.

Claiming that "a century of precedent" supports their position, respondents depict petitioners as advocates of "a radical shift in the test for determining whether [U.S.] interests are sufficiently implicated to trigger the Sherman Act's proscriptions" (Br. 4, 6). But it is respondents who propose a radical expansion of federal antitrust law. None of their "three principal precedents addressing worldwide cartel activity" (*id.* at 7)—each brought by the U.S. Government to enjoin conduct affecting U.S. commerce—says *anything* about the ability of private plaintiffs to recover damages for injuries caused by a cartel's foreign effects.

In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the Government sought to break up market-allocation arrangements that harmed the United States. Nothing in the opinion indicates any concern with the cartel's effect on foreign countries. Indeed, the Government sought to require the foreign defendants to comply with U.S. law only "so far as their dealings in the United States were concerned." *Id.* at

[3] Respondents argue (Br. 37-38) that, because persons injured in *intra*state commerce can have standing, respondents' injuries must be remediable as well. While the U.S. antitrust laws may reach injuries sustained in *intra*state commerce that have a substantial nexus with *inter*state commerce (*Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332 (1991)), respondents' injuries were sustained in foreign commerce, and lack the required nexus with U.S. commerce. They accordingly are not remediable under the U.S. antitrust laws. *Matsushita*, 475 U.S. at 582.

153. *United States v. National Lead Co.*, 332 U.S. 319 (1947), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), similarly involved Government challenges to market-allocation schemes that restricted imports to and exports from this country. 332 U.S. at 343-45 & n.6; 341 U.S. at 594-96. These cases in no way support respondents' thesis that private injuries resulting from foreign market effects are actionable under U.S. law. They simply reflect the traditional "effects" doctrine discussed in *Alcoa* and recognized by this Court in *Hartford Fire*. Concern for the U.S. effects of foreign conduct is the *only* justification for extraterritorial projection of U.S. antitrust law recognized by Congress or this Court.

Respondents incorrectly assert (Br. 41) that, as of the time the FTAIA was enacted, "several" cases had approved claims seeking recovery for injuries sustained in transactions outside U.S. commerce. The cases they cite do not support that contention. In each case, the plaintiff was seeking damages for injuries it sustained directly as a result of harm to U.S. export or U.S. import commerce.

In *Industria Siciliana*, the plaintiff complained that defendants had "restrain[ed] competition *in the United States refinery design and engineering market.*" 1977 WL 1353, at at *3 (emphasis added). Jurisdiction was upheld because the plaintiff "was injured in its business by reason of an alleged restraint of our domestic trade" involving "the export of services" purchased by the plaintiff. *Id.* at *12. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), and *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F. Supp. 680 (S.D.N.Y. 1979), are equally irrelevant. The plaintiff in *Hunt* claimed that defendants conspired to cause the nationalization of its business of producing and exporting oil from Libya. It was unquestioned that the nationalization affected U.S. oil imports. 550 F.2d at 74. In *Dominicus*, the court viewed plaintiffs' claim that defendants prevented them from providing services to U.S. tourists as equivalent to a

claim that defendants restrained U.S. export commerce. 473 F. Supp. at 688. In short, the plaintiffs in *Industria Siciliana*, *Hunt* and *Dominicus* all alleged injuries as participants in U.S. import or U.S. export commerce (and Congress, in passing the FTAIA, referred critically to *Industria Siciliana* and *Dominicus* as cases that reached too far in permitting claims by purchasers of U.S. exports. H.R. Rep. No. 97-686, at 5 (Resp. App. 9a)). Respondents claim no such link to the United States. Their vitamin purchases were purely foreign.

Respondents' reading of *Pfizer*, 434 U.S. 308 (Br. 14-15, 36, 39), likewise does not withstand scrutiny. *Pfizer* did not decide that injuries resulting from harms to foreign commerce are compensable under the antitrust laws. Rather, the Court held that foreign governments are "persons" entitled to assert claims for damages under the Clayton Act. The Court assumed, as an underlying premise, that foreign governments invoking Section 4 had "*enter[ed] our commercial markets.*" *Id.* at 318 (emphasis added).

This Court's subsequent decision in *Matsushita* reiterates the antitrust laws' exclusive concern with harms to U.S. commerce. The Court rejected arguments by U.S. television manufacturers that defendants' price-fixing in Japan was part of a larger unified conspiracy to eliminate competition through predatory pricing in the U.S. market. The Court explained that conduct affecting the Japanese market was legally irrelevant because such conduct "cannot" cause "an injury for which the antitrust laws provide relief." 475 U.S. at 584 n.7. To establish a remediable injury, the Court held, the plaintiffs needed to show anticompetitive conduct "in the American market." *Id.* Respondents contend (Br. 42 n.28) that these statements were "factual" observations, not legal rulings. But the Court's categorical conclusion that price-fixing directed at foreign markets "cannot" establish an "injury for which the antitrust laws provide relief" refutes that

reading. *Matsushita* squarely supports the proposition that the federal antitrust remedy exists only for injuries caused by harms to U.S. commerce.

III. RESPONDENTS' FOREIGN INJURIES FALL OUTSIDE THE SCOPE OF U.S. ANTITRUST LAW WHETHER OR NOT THERE WAS A "WORLDWIDE" MARKET FOR VITAMINS.

Respondents' chief argument rests on their contention (Br. 10) that the United States is part of a "global" or "worldwide" market for vitamins. That argument fails because respondents' "worldwide" market assertion is irrelevant as a matter of law. The geographic scope of the vitamins market has no bearing on the ability of persons who purchase goods in foreign commerce to assert claims under U.S. law.[4]

Respondents argue (Br. 10-13) that, because the market for vitamins is allegedly a "global" one, it makes no difference whether their injuries were sustained in foreign commerce or U.S. commerce. But the jurisdictional scope of the U.S. antitrust laws is defined by reference to *commerce*, not *markets*—and in particular to U.S. commerce, which is made up of U.S. domestic, import and export transactions. Injuries sustained in transactions outside U.S. commerce are not actionable (see *supra*, p. 4), whether or not the *market* in which those transactions take place includes the United States. Market definition may, in particular cases, bear on whether the antitrust laws have been *violated*, but it does not determine whether or not they *apply*.

Respondents contend (Br. 6) that it is irrelevant where the transactions in which they were injured took place, noting that the word "transactions" appears "zero times" in the

[4] Although respondents' "global market" characterization is irrelevant, petitioners nevertheless note that respondents wrongly assume (Br. 9-10) that a conspiracy of purportedly global reach indicates a global market. In very few instances have U.S. antitrust regulators or courts found that a market was "global" in scope.

Sherman Act, Clayton Act and FTAIA (a fact also true of the word "market"). But "transactions" are the constituents of "commerce," and U.S. "commerce" is the jurisdictional touchstone of both the Sherman Act and the FTAIA. Indeed, the House Report on the FTAIA uses the word "transactions" twenty-two times in discussing the jurisdictional reach of the antitrust laws.

Respondents also argue (Br. 11) that their injuries, although sustained in purely foreign transactions, were actually caused by the cartel's effect on the United States, because "the cartel in the U.S. precluded overseas purchasers from purchasing vitamins in the U.S., or in their own countries from intermediaries who purchased here for resale abroad." But there is no allegation in the complaint or suggestion in the record that anyone (purchaser or middleman) was "precluded" from "purchasing vitamins in the U.S." And respondents concede (Br. 12) that they never actually attempted to purchase vitamins in the United States. In any event, respondents' injuries cannot plausibly be attributed to prices in the United States for vitamins *they did not purchase*. They brought this case to recover overcharges paid in foreign countries for vitamins they *did* purchase. They cannot twist that foreign injury into a U.S. injury by hypothesizing that it might have been avoided "if only" conditions in the United States had been different.

If respondents' "global market" argument were accepted, persons injured in foreign transactions having no connection to the United States could invoke U.S. antitrust remedies simply by alleging that the "market" at issue includes both the United States and the foreign country where the transactions took place. Courts would be required to grapple with the "enormous complexities of market definition" (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430-31 (1990)), simply to determine the threshold question of jurisdiction. In this case, the district court would immediately face the dizzying question whether, for each of the many

different vitamins and countries potentially at issue, the "market" in which each individual plaintiff was injured includes the United States. It defies belief that the federal antitrust laws require such an exercise.

IV. PERMITTING ANTITRUST CLAIMS FOR INJURIES SUSTAINED OUTSIDE U.S. COMMERCE WILL NOT ENHANCE DETERRENCE.

Respondents argue (Br. 13-19) that U.S. interests would be advanced if respondents could assert treble damages claims under U.S. law. But the United States has unequivocally rejected that contention, and (joined here by other nations) has explained that respondents' position would actually undermine government amnesty programs, which are the preeminent means by which cartels are detected. U.S. Br. 19-21. Conspirators who participate in the U.S. amnesty program receive relief from criminal but not civil liability under federal law. Making U.S. treble damages remedies available on a worldwide basis would, in the Government's view, discourage potential cooperators from disclosing violations out of concern for their substantially increased civil liability to potential claimants worldwide. *Id.* Detection of foreign cartels is critical to effective deterrence, because absent a real threat of detection, both criminal and civil liability have little deterrent effect. By undermining the effectiveness of amnesty programs, respondents' proposal would lessen, not increase, overall deterrence.[5]

Effective U.S. antitrust enforcement also depends on the cooperation of law enforcement officials in other nations (U.S. Br. 22) who share information, search records of

[5] Respondents argue (Br. 44) that the Court should not consider this adverse impact on the Department of Justice's amnesty program in construing statutes enacted before the program's modern formation. But to assess respondents' assertion that permitting their claims will enhance deterrence, it is necessary to consider how their position would affect existing means of detecting illegal cartels.

overseas businesses and conduct joint investigations. Seven foreign nations have stated as *amici* that the court of appeals' ruling would harm cooperative international enforcement.

To say that effective deterrence may require an increase in some sanctions is not to endorse every possible liability. Unlike respondents' proposal, increased fines or criminal penalties would not discourage cooperation under the Government's amnesty program. Deciding whether additional deterrence is necessary and, if so, what form it should take are judgments that properly rest with the policy-making branches of government.

V. THE FTAIA AFFIRMATIVELY BARS RESPONDENTS' CLAIMS.

The FTAIA reinforces the longstanding principle that federal antitrust law is concerned with harms to U.S., not foreign, commerce. The FTAIA was enacted to clarify the "quantum and nature" of U.S. effects necessary to support jurisdiction over foreign conduct and to exempt exporters from claims by purchasers of U.S. exports. Resp. App. 7a-9a. The statute's requirements that foreign conduct have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce and that such effect "give[] rise to" a claim reflect the basic structure of the private damages scheme of the Sherman and Clayton Acts, which permits recovery only for injuries sustained from harms to U.S. commerce. The FTAIA thus is an additional bar to respondents' claims, which do not "arise from" any U.S. effect.

A. The FTAIA Applies To Cases Involving Purely Foreign Transactions.

Respondents' assertion (Br. 20-21) that the FTAIA does not apply—because the alleged vitamins cartel involves U.S. import commerce and because the FTAIA limits jurisdiction only in connection with U.S. exports—was never raised below. Moreover, the statute's language and legislative history refute both of these arguments.

Respondents complain of injuries sustained in purely foreign commerce, not import commerce. Their argument that the FTAIA does not apply to their claims because the vitamins cartel also affected U.S. imports rests on a misreading of the statute's introductory phrase. The parenthetical exclusion "(other than import trade or import commerce)" limits the kind of "trade or commerce * * * with foreign nations" to which the FTAIA applies. It simply means that the FTAIA does not apply to conduct that involves only "import trade or import commerce." Thus, it does not matter that the cartel in this case may have affected "import commerce." Respondents do not complain of any such domestic effect but rather of harm to purely foreign commerce.

Respondents' argument that the FTAIA applies only to export commerce has no support in the text or history of the statute. The legislative history makes clear that the statute was revised prior to enactment precisely to ensure that it would *not* be limited to exports and would govern "wholly foreign transactions." As the House Report explains:

> "The desirability of another change soon became apparent. The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. * * * The Committee amendment therefore deletes references to 'export' trade, and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered* by the amendment, but that import transactions are not." Resp. App. 16a (emphasis added).

Respondents' suggestion (Br. 20) that *Hartford Fire* held that the FTAIA applies only to exports is erroneous. The Court assumed without deciding that the FTAIA does apply to cases involving transactions other than U.S. exports. 509 U.S. at 796 n.23. It held that jurisdiction existed over foreign

practices that had substantial and intended effects on U.S. commerce in a case where those U.S. effects were the gravamen of the plaintiffs' complaint. *Id. Hartford Fire* is an example of the proper application of the "effects" test and illustrates the deficiency in respondents' allegations.

Respondents argue (Br. 21) that the FTAIA's only restriction on foreign claimants' ability to sue appears in the proviso. But the proviso's bar on suits by foreign claimants injured in U.S. export commerce hardly suggests that Congress intended to permit suits by persons injured in *wholly foreign commerce*. Contrary to respondents' claims (*id.*), the floor statement of Representative McClory that "foreign nationals located abroad may in some instances recover under our antitrust laws" (128 Cong. Rec. H4982 (daily ed. Aug. 3, 1982)) does not suggest that foreign nationals can recover for injuries sustained outside U.S. commerce. It simply reflects the longstanding rule that a person need not be located in the United States to recover for injuries sustained in U.S. commerce.

B. The FTAIA Bars Claims That Do Not Arise From An Effect On U.S. Commerce.

Respondents deny that subsection (2) of the FTAIA requires that *their* claims arise from a direct, substantial and reasonably foreseeable effect on U.S. commerce. They contend that the sole purpose of subsection (2) is to require that the effect on U.S. commerce required under subsection (1) be an "anticompetitive effect," *i.e.*, one that would "give rise to a claim" *by someone*. Their position rests on the unfounded supposition (Br. 25-30) that the only purpose of subsection (2) was to codify the holding of *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), that foreign activity must harm competition in the United States to be subject to U.S. antitrust jurisdiction. See *id.* at 8-9 (holding that jurisdiction was lacking where "the anticompetitive effect" complained of was "felt only within

the foreign market"). In fact, the language enacted by Congress, in addition to requiring an anticompetitive effect in this country, *also* incorporates basic principles of antitrust standing into subsection (2) by requiring that the plaintiff's claim arise from the same domestic effect. U.S. Br. 12. Respondents' position requires the wholly implausible conclusion that the restrictive language of subsection (2) was intended to radically enlarge standing under the U.S. antitrust laws, which Congress specifically disclaimed any intention to do. Resp. App. 18a. None of the government materials or treatises and only one of the law review articles cited by respondents (Br. 26) actually embraces their sweeping view that the FTAIA contemplates the application of U.S. antitrust laws to purely foreign transactions.

Respondents argue (Br. 28) that Congress changed the language of subsection (2), which previously had provided that the required U.S. effect must be "the basis of the violation alleged" under the Sherman Act, to avoid the construction of the FTAIA that petitioners and the Government support. But the "drafting history" they cite reveals no such purpose. To the contrary, Chairman Rodino, who was responsible for the final language of subsection (2), stated that it was intended to have the *same effect* as the earlier version. He explained that the "substituted language accomplishes the same result as the Committee version and is better * * * because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." Resp. App. 29a. Congress adopted the final version to correct a perceived error of diction and not to relax the requirement "that the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." Resp. App. 20a. See *Nixon v. Missouri Mun. League*, 541 U.S. __, No. 02-1238, 72 U.S.L.W. 4256, slip op. at 6 (Mar. 24, 2004) (concluding that Congress used word "any" with "a limited reference" given the "strange and indeterminate" results that would otherwise obtain).

Respondents' contention (Br. 11) that their claims "arise from" a U.S. effect is mere wordplay that would strip subsection (2) of any real meaning. Only through the most attenuated logic can they say that their injuries, which indisputably arise from anticompetitive prices they paid abroad, *also* arise from an effect on U.S. commerce—as a result of the supposedly "global" market for vitamins. See *supra*, p. 10-12. Under that theory, their claims could equally be said to arise from effects in France, Germany, Japan or any other nation. Their assertion that the "market" in which they were injured includes the United States cannot supply the nexus to U.S. harm that the statute requires. See *Heere-Mac*, 241 F.3d at 425. The FTAIA directs courts to distinguish between the U.S. and foreign effects of anti-competitive conduct—and limits U.S. antitrust jurisdiction to the former. Respondents' assertion that their claims arise from the "worldwide" effects of petitioners' conduct flies in the face of the line-drawing that the statute requires. Their reliance on cases involving construction of insurance contracts, arbitration agreements and state long-arm statutes (Br. 13 n.10) only confirms that their argument has no foundation in the FTAIA.

Respondents argue (*id.* at 28 & n.21) that Congress did not adopt proposals that would have explicitly barred their claims. But those proposals were offered from an abundance of caution, not because they were deemed necessary. See House Hearings on H.R.2826, at 106, 111, 116. No significance can be ascribed to their absence from the final statute. See *United States v. Craft*, 535 U.S. 274, 287 (2002) ("'Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that *the existing legislation already incorporated the offered change*'") (citation omitted) (emphasis added).[6]

[6] Nor is it germane (Resp. Br. 43 & n.29) that Congress considered, but did not pass, later proposed amendments to the FTAIA. None of those proposals suggests that Congress believed that persons injured outside U.S. commerce could sue under U.S. law.

VI. RESPONDENTS' POSITION WOULD IMPOSE SERIOUS JUDICIAL BURDENS AND GENERATE INTERNATIONAL DISCORD.

Respondents (Br. 39-41) have no real response to petitioners' argument, seconded by the United States, that respondents' proposed construction of the antitrust laws would create serious burdens for the federal district courts and generate friction with U.S. allies and trading partners. Acceptance of their claims would invite a flood of future litigation based on purely foreign transactions. The FTAIA amends the entire Sherman Act, and thus such lawsuits would not be confined to cartel cases but also would reach rule of reason litigation involving vertical restraints, tying, exclusive dealing, mergers and unilateral conduct. Lured by treble damages and attorneys' fees, foreign plaintiffs would ask U.S. courts for relief from practices and commercial transactions affecting foreign commerce whenever the same or similar practices or transactions can be claimed to have affected commerce of the United States.

Respondents' rule would lead to anomalous and burdensome results that Congress cannot reasonably be thought to have intended. Peruvian purchasers, for example, who were the only direct purchasers of goods from a cartel of Peruvian sellers could assert treble damages claims under U.S. law in federal court if a portion of the goods were resold into the United States, because indirect purchasers have "a claim" for injunctive relief under U.S. law. Under respondents' theory, district courts would have to determine whether there is a person with an actionable U.S. injury and, if so, to examine local market conditions all over the world from Australia to Ecuador to Ukraine. These enormous burdens weigh heavily against concluding that Congress

sought to convert federal district courts into world courts dispensing global remedies.

The broader costs of such a ruling are reflected in the *amicus curiae* briefs of seven of this country's allies and trading partners, which protest the court of appeals' decision as an invasion of their sovereign authority to regulate their own internal economies. It is no answer (Resp. Br. 6, 47-49) that doctrines of "comity" permit individual courts to decline jurisdiction on a case-by-case basis. The question here is whether Congress projected U.S. antitrust law extra-territorially in the first place to reach transactions of primary concern to foreign sovereigns. The Sherman and Clayton Acts do not purport to reach so far, and the FTAIA was enacted to lay down a "clear benchmark" for the threshold question of "jurisdiction." Resp. App. 5a, 15a. As the U.S. Government has explained (Br. 14-15), this Court traditionally has avoided construing federal law in ways that might cause friction with foreign governments. That approach is particularly important here given the Government's need for other nations' cooperation both in enacting and in enforcing antitrust prohibitions against international cartels.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE D.C. CIRCUIT'S EXPANSIVE INTERPRETATION OF U.S. ANTITRUST JURISDICTION CONFLICTS WITH CONGRESS' INTENT 7

A. The Concerns Prompting the FTAIA Were the Expansive Reach of U.S. Law and the Uncertainty of Application. 8

B. The Intent to Limit Jurisdiction Is Clear ... 11

1. The Sponsors Intended for the FTAIA to Limit the Reach of U.S. Antitrust Law 11

2. The Witnesses Well-Understood the Jurisdiction-Limiting Effects of the FTAIA 12

3. The D.C. Circuit Misconstrued the Committee Reports As Evincing an Intent to Expand Rather Than Narrow U.S. Antitrust Jurisdiction 13

II. THE DECISION BELOW THREATENS THE ALLOCATION OF ANTITRUST JURISDICTION INTENDED BY CONGRESS. 22

CONCLUSION 29

TABLE OF AUTHORITIES

	Page
CASES:	
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909)	3
Den Norske Stats Oljeselskap As v. *HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)	16, 19
Dominicus Americana Bohio v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979)	3
In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D. Md. 2001)	16
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	3
Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978)	16
United States v. *Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)	3
United States v. *General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949)	3
United States v. *Sisal Sales Corp.*, 274 U.S. 268 (1927)	3
Verizon Communications, Inc. v. *Trinko*, 124 S. Ct. 872 (2004)	28
STATUTES:	
15 U.S.C. § 1	2, 5
15 U.S.C. § 4	16

TABLE OF AUTHORITIES—Continued

	Page
Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a	*passim*
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 97-686 (1982)	*passim*
H.R. Conf. Rep. No. 97-924 (1982)	14
Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. (1981)	*passim*
Hearing on S. 795 Before the Senate Comm. on the Judiciary, 97th Cong. (1981)	*passim*
127 Cong. Rec. H779 (daily ed. Mar. 4, 1981)	13
127 Cong. Rec. 3538 (Mar. 4, 1981)	11
128 Cong. Rec. 18952 (Aug. 3, 1982)	12, 24
OTHER AUTHORITIES:	
Edward D. Cavanaugh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 S.M.U. L. Rev. 2151 (Fall 2003)	5
International Competition Policy Advisory Comm. Final Report (Dep't of Justice 2000) <http://www.usdoj.gov/atr/icpac/final-report.htm>	25, 26

TABLE OF AUTHORITIES—Continued

	Page
Karen O'Brien, *Giving Rise to a Claim: Is FTAIA's Section 6a(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 Sw. J.L. & Trade Am. 421 (2002-2003)	4
James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* (1997)	10
Patti Waldmeir, *Should America Be the World's Price-Fixing Policeman?*, Fin. Times, Dec. 22, 2003	22
Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000)	5
William J. Kolasky, *United States and European Competition Policy: Are There More Differences Than We Care to Admit?* <http://www.usdoj.gov/atr/public/speeches/10999.htm>	28

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BRIEF FOR AMICUS CURIAE THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Business Roundtable is an association of the chief executive officers of approximately 150 leading corporations with a combined workforce of more than ten million employees in the United States and about $3.7 trillion in revenues.[1] The executives who created The Business Roundtable believed that one way business could play a more constructive role in policymaking was to bring the chief executive officers of major corporations more directly into

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The Business Roundtable has a strong interest in ensuring that the FTAIA is properly applied to limit the scope of U.S. antitrust laws, consistent with their primary purpose of protecting U.S. consumers. The Roundtable was actively involved in working with Congress in the development and enactment of the FTAIA, and can therefore knowledgeably address the D.C. Circuit's misunderstanding of Congress' intent. The legislative history—including testimony from the Business Roundtable cited favorably in the committee report—evinces an intent that is directly opposite from the one surmised by the D.C. Circuit. Moreover, because The Business Roundtable's members include some of the largest multinational corporations in the world, it has a significant interest in ensuring that international antitrust enforcement works in an efficient and effective manner. It is thus in a position to discuss the practical difficulties that will result from the Court of Appeals' misinterpretation of the FTAIA.

Petitioners have explained in detail why the D.C. Circuit's decision is at odds with the plain language of the FTAIA. As explained below, the court likewise misinterpreted the statute's legislative history—which evinces an intent to *narrow* the scope of U.S. antitrust laws—as instead reflecting an expansion of that scope to cover plaintiffs whose alleged claims have no connection whatsoever to this country. That decision was error and should be reversed.

STATEMENT OF THE CASE

1. Pre-FTAIA Application of the Sherman Act. Although Section 1 of the Sherman Act declares illegal "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce * * * with foreign nations," 15 U.S.C. § 1, this Court has long recognized that "American antitrust laws

do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

Despite early uncertainty as to whether the Sherman Act had *any* extraterritorial effect, *see American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.), this Court eventually determined that some conduct occurring outside of the U.S. can run afoul of the Sherman Act. *See United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). The Second Circuit thereafter articulated what would become the dominant test for determining jurisdiction—the "effects test"—which asks whether extraterritorial conduct was "intended to affect imports [into the United States] and did affect them." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) ("*Alcoa*").

Although most federal courts after *Alcoa* adopted some form of the "effects test," courts disagreed on the quantum and nature of the effects required to trigger U.S. antitrust jurisdiction. For example, some courts required that conduct have a "direct[] and substantial[]" effect on domestic commerce, *see, e.g.*, *United States* v. *General Electric Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949), while others stated that "it is probably not necessary for the effect on [U.S.] foreign commerce to be both substantial and direct as long as it is not de minimus." *Dominicus Americana Bohio* v. *Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

In addition to the uncertainty resulting from these competing formulations, the expansive reach of U.S. antitrust law resulting from the "effects test" prompted criticism both within the U.S. and abroad:

> Two fronts of opposition formed against the expansive reach of American antitrust law. American businesses feared exposure to liability for anticompetitive conduct in foreign commerce and complained that their ability to compete abroad was severely hindered due to the confu-

sion surrounding the application of these tests. Additionally, countries such as Canada, Britain, Australia, France, the Netherlands, and South Africa responded to this "unilateral extraterritorial application of competition laws" with their own legislation permitting a foreign defendant's non-compliance with discovery requests, payment of treble damage awards, and even recovery of paid damages by actions in their own courts. [Karen O'Brien, *Giving Rise to a Claim: Is FTAIA's Section 6a(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 Sw. J. L. & Trade Am. 421, 425 (2002-2003) (citations and footnotes omitted).]

2. The FTAIA. Businesses and legal scholars alike urged Congress to adopt legislation to resolve the uncertainty concerning jurisdictional standards and to *restrict* the reach of U.S. antirust laws to claims involving direct effects on U.S. commerce and markets. Congress responded by enacting the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). This Act added a new section to the Sherman Act, which provides:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. [15 U.S.C. § 6a.]

Although the text of the FTAIA is "cumbersome and inelegant," Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272(h)(2), at 359 (2d ed. 2000), careful parsing makes its meaning clear: "By its terms, the statute limits the subject matter jurisdiction of the antitrust laws by providing that the Sherman Act shall not apply to trade or commerce with foreign nations unless (1) that conduct has a 'direct, substantial and reasonably foreseeable effect' on domestic or export commerce of the United States and (2) 'such effect gives rise to a claim' under the Sherman Act." Edward D. Cavanaugh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 S.M.U. L. Rev. 2151, 2157 (Fall 2003) (quoting 15 U.S.C. § 6a).[2]

3. This Case. This case began in July 2000 when the respondents filed a putative class action lawsuit on behalf of all foreign purchasers of certain vitamin products, alleging that a worldwide cartel of bulk vitamin distributors conspired to fix prices and allocate markets on a global basis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[3] *See*

---

[2] "The FTAIA also provides an exception to the exception by specifically asserting jurisdiction over matters involving import trade or commerce." *Id.*

[3] The underlying activities giving rise to this action have prompted a flurry of criminal and civil antitrust actions around the world. Some of the petitioners have pled guilty to criminal antitrust violations in this country and have paid collectively $900 million in fines. Pet. 5. In addition, more than 75 federal antitrust cases, including class actions, were consolidated for pretrial proceedings in the district court, and most of the claims in those

Empagran S.A. v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 340 (D.C. Cir. 2003). The respondents are foreign corporations that are domiciled in various foreign countries and that purchased vitamins abroad for delivery outside of the United States. *Id.* at 342. The petitioners filed a motion to dismiss for lack of subject matter jurisdiction under the FTAIA, on the ground that the transactions giving rise to their alleged injuries had absolutely no connection to the United States.

After reviewing the FTAIA and its legislative history—and in light of the conceded fact that up until that time "no court ha[d] ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case"—the district court agreed and concluded that it lacked jurisdiction. *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360, at *2-*4 (D.D.C. June 7, 2001).

On appeal, a split panel of the D.C. Circuit reversed. The majority concluded that U.S. antitrust laws provide a remedy for injuries sustained by foreign purchasers in wholly foreign transactions, provided that "someone, even if not the foreign plaintiff who is before the court," has "a claim" based on the effects of the defendants' conduct on domestic commerce. *Empagran*, 315 F.3d at 341.

SUMMARY OF ARGUMENT

As the legislative history of the Act shows, Congress enacted the FTAIA in 1982 in order to *narrow* the scope of U.S. antitrust jurisdiction, by providing that such jurisdiction does not extend to claims not predicated on anticompetitive effects in the U.S. domestic markets. The Court of Appeals

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actions have now been settled for amounts totaling in excess of $2 billion. *Id.* The European Union, Canada, Australia and Korea also have assessed civil penalties exceeding €855 million, and private civil suits, including class actions, have been filed in at least seven foreign countries. *Id.* Thus, this is a case in which there has been substantial U.S. and foreign antitrust enforcement.

turned the Act on its head, interpreting it in a manner that *expands* the reach of the U.S. antitrust laws to claims predicated on wholly foreign transactions. When the legislative history relied on by the D.C. Circuit is properly read in full context, the legislative record shows Congress' intent *not* to apply U.S. antitrust laws to claims like those at issue here. The D.C. Circuit's interpretation opens United States courts to persons with no vested interest in the laws of the United States or their enforcement, in contravention of Congress' intent.

The Court of Appeals' decision undermines Congress' objectives in enacting the FTAIA, and takes U.S. antitrust law beyond the limits Congress intended. The result will be unnecessary intrusion into markets regulated by other enforcement authorities, and application of U.S. law to transactions with no substantial connection to U.S. markets or consumers—the intended focus of our antitrust laws. If allowed to stand, the decision will open the doors of the federal courts to antitrust plaintiffs from around the world and subject multinational corporations to overlapping and conflicting antitrust regulation, while diminishing the effectiveness of international antitrust enforcement. These results could not be further from Congress' intent in enacting the FTAIA.

ARGUMENT

I. THE D.C. CIRCUIT'S EXPANSIVE INTERPRETATION OF U.S. ANTITRUST JURISDICTION CONFLICTS WITH CONGRESS' INTENT.

Congress' purpose in passing the FTAIA was to create a clear standard for determining when U.S. antitrust law applies to a transaction and to *limit* that jurisdiction to claims based on transactions that affect U.S. markets and consumers. The legislative history consistently describes the FTAIA as legislation intended to restrict, not expand, jurisdiction over foreign transactions. This history is entirely inconsistent with the expansive jurisdiction exercised by the D.C.

Circuit below. While that court upheld jurisdiction whenever a hypothetical domestic plaintiff would have "a claim" based on some conception of a defendant's conduct, the FTAIA requires that "the [domestic] 'effect' providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws*." H.R. Rep. No. 97-686, at 12 (emphasis added) ("House Report").

A. The Concerns Prompting the FTAIA Were the Expansive Reach of U.S. Law and the Uncertainty of Application.

In testimony cited favorably by the House Judiciary Committee, The Business Roundtable explained to Congress the need for legislation to clarify the standards for U.S. antitrust jurisdiction, in part to provide certainty so that potential business transactions would not "die on the drawing board." House Report at 6. The House Judiciary Committee agreed, citing the following as its two primary concerns underlying the FTAIA:

> First is the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services. Second, courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. [House Report at 2.]

Again quoting The Business Roundtable, the House Judiciary Committee agreed that " 'no legitimate purpose is served by perpetuating uncertainty on th[e] fundamental question' " of the scope of U.S. antitrust jurisdiction. *Id.* at 6.

During hearings on the legislation, Congressman Rodino, the Chairman of the House Judiciary Committee and co-sponsor of the FTAIA, voiced these and other concerns regarding the extraterritorial application of U.S. antitrust law:

> There is discontent with and uncertainty about the international reach of present antitrust law on the part of many potential American exporters. * * * In addition, many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws. Some have enacted laws to block our enforcement efforts.
>
> This suggests that we should consider proposals that would provide greater certainty regarding the international scope of these laws. [*Hearings on H.R. 2326 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong. 1 (1981) ("*House Hearings*").]

Testimony before both the House and Senate Judiciary Committees by antitrust scholars, practitioners, government officials, and businesspeople (including a representative of The Business Roundtable) substantiated these concerns. For example, former Assistant Attorney General John Shenefield testified that "it is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States." *House Hearings* at 70.

Likewise, Martin Connor testified on behalf of The Business Roundtable:

> The Roundtable agrees with the sponsors of H.R. 2326 that there is uncertainty today about the actual reach of our antitrust laws in foreign commerce.
>
> This uncertainty adversely affects the ability of American businesses to enter into international transactions that would be highly beneficial and to compete effectively with foreign companies for a share of world markets. [*Id.* at 105.]

Other witnesses expressed similar concerns. Former FTC Commissioner Robert Pitofsky (who later became Chair of the Commission) testified about the need to distinguish

between transactions having domestic impact and purely foreign transactions. He pointed out that foreign governments were in the process of increasing their antitrust enforcement (a trend that was to grow markedly in the 1990s), and that U.S. law should respect and encourage that development:

> [I]t strikes me as a general matter that we need to rethink antitrust enforcement involving foreign transactions. *There are a number of commentators, judges, and enforcement officials who take the position that the antitrust laws ought to apply in exactly the same way when a foreign transaction is involved as a domestic transaction, and I think that is just not right.* There are too many differences with respect to foreign trade. * * *
>
> I know of no country which has applied its antitrust laws with the extraterritorial reach that we have applied our antitrust laws in previous years. * * * *There is no reason why French antitrust law or Common Market antitrust law will not apply.* We have seen developments in foreign antitrust law in the last 10 or 15 years, and we know that those laws are being enforced more vigorously. [*Hearings on S. 795 Before the Senate Committee on the Judiciary*, 97th Cong. 24-26 (1981) ("*Senate Hearings*") (emphasis added).]

Likewise, James R. Atwood, the author of *Antitrust and American Business Abroad*, stated:

> *The effects and consequences in foreign markets ought to be primarily a responsibility of foreign law and not American law.*
>
> I think there are two basic reasons for this. First, for U.S. law to intercede on the question of foreign-market effects can impose in some cases a self-inflicting wound on U.S. export competitiveness and provide disincentives to exporters that are unnecessary from the standpoint of our national interests and which may, in fact, conflict with

> the interests of the governments abroad most directly affected.
>
> Similarly, the political difficulties which U.S. antitrust enforcement have caused from time to time have been exacerbated by the foreign market effects application of U.S. law. To redefine and clarify our law so that *foreign market effects are carved out and made the responsibility of foreign law* is, I think, a positive development in ameliorating the international political tension that now exists in the area of antitrust enforcement. [*House Hearings* at 84 (emphasis added).]

Mr. Atwood emphasized that "if a challenged restraint has its primary impact abroad, if foreign markets are the concern rather than domestic markets, then the matter should be left to foreign law." *Id.* at 85.

B. The Intent to Limit Jurisdiction Is Clear.

Congress made clear not only the problems it was addressing, but also the method by which it would answer these concerns—to establish clear standards that would limit the reach of U.S. antitrust law to claims that involve domestic effects.

1. The Sponsors Intended for the FTAIA to Limit the Reach of U.S. Antitrust Law.

On the day that the FTAIA was introduced in the House, the co-sponsors of the legislation were clear about this intent. Congressman Rodino explained that the bill would "modif[y] the Sherman Act to more clearly establish when antitrust liability attaches to international business activities." 127 Cong. Rec. 3538 (Mar. 4, 1981) (statement of Rep. Rodino). The focus would be on domestic effects in order to "allow[] American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace." *Id.*

Similarly, Congressman McClory, the bill's co-author, emphasized that the law was intended to limit, not expand, the scope of the U.S. antitrust laws:

> It is important to note that H.R. 5235 circumscribes the antitrust laws. In graphic terms, it draws a circle around the antitrust laws and states that nothing outside the circle is covered. * * * *We are establishing a rule for noncoverage, not a rule for coverage. It is, in a sense, a tool for defendants but not for plaintiffs.* * * * [128 Cong. Rec. 18952, 18953 (Aug. 3, 1982) (statement of Rep. McClory) (emphasis added).]

Senator Thurmond, a co-sponsor of the Senate version of the legislation, expressed a similar understanding during the Senate's hearings: "The bill is designed to relieve the antitrust concerns of American businessmen over their conduct which primarily affects foreign, rather than domestic markets." *Senate Hearings* at 1. Senator Thurmond noted that the FTAIA, rather than establishing jurisdiction over foreign effects, "insures the proper focus and direction for our antitrust laws"—namely, "to protect our domestic markets and our consumers." *Id.*

2. The Witnesses Well-Understood the Jurisdiction-Limiting Effects of the FTAIA.

Not surprisingly, witnesses both for and against the FTAIA expressed the view that the Act would circumscribe, rather than expand, the reach of U.S. antitrust law. For example, Professor Eleanor Fox told the House Judiciary Committee that she understood that the legislation would make clear that "U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries." *House Hearings* at 29.[4] And Professor James A. Rahl, one of

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[4] Other proponents of the legislation shared this understanding. *See, e.g., Senate Hearings* at 24, 44 (statement of Robert Pitofsky) (noting that with the FTAIA, the United States would be "withdrawing [its] hand from transactions which exhaust all market consequences abroad").

the most ardent opponents of the legislation, complained to the Committee that the FTAIA "really repeals the whole 'foreign commerce' clause of the Sherman Act." *Id.* at 46. Thus, regardless of whether they supported or opposed the legislation, all involved were aware that the FTAIA *restricted* U.S. antitrust jurisdiction.

3. The D.C. Circuit Misconstrued the Committee Reports As Evincing an Intent to Expand Rather Than Narrow U.S. Antitrust Jurisdiction.

The legislation that finally emerged deprived the U.S. courts of jurisdiction over claims based on foreign transactions that have no effect on U.S. commerce. Both the House Report and the Conference Report make this clear.[5] The House Report explained that the FTAIA would allow " 'American firms *greater freedom* when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive *domestic marketplace*.' " House Report at 7 (quoting 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981)) (emphasis added).

The FTAIA would accomplish these goals by providing a "single, clear standard"—the "direct, substantial, and reasonably foreseeable effect" standard—to guide the parties and the courts concerning the applicability of U.S. antitrust law. *Id.* at 2. This "single, objective test" would "make explicit" that the Sherman Act and other antitrust laws "appl[y] *only* to conduct having a 'direct, substantial, and reasonably foreseeable effect' on *domestic* commerce or domestic exports." *Id.* (emphasis added).[6]

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[5] The Senate Judiciary Committee did not issue a report to accompany its version of the legislation.

[6] The Conference Report, while providing less substantive discussion of the legislation, plainly embraced the same view

The House Report's detailed discussion of the application of this standard further supports what the D.C. Circuit referred to as the "restrictive" view of the statute. As is clear when the statements in the House Report are viewed in context and as a whole, Congress intended to exclude from U.S. antitrust jurisdiction claims not based on domestic anticompetitive effects—like those in this case.

Purely Foreign Transactions. Significantly for this case, the House Report makes clear that Congress did not intend for U.S. antitrust jurisdiction to extend to "purely foreign" transactions. *Id.* at 9-10. The Committee clarified that, by explicitly exempting export transactions from jurisdiction and explicitly recognizing jurisdiction over import transactions, it did not intend to suggest that "transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations" were within U.S. antitrust jurisdiction. *Id.* at 9. The respondents' claims in this case involve the kind of purely foreign transactions that the FTAIA was intended to exclude from the ambit of U.S. antitrust laws.

The Foreign Impact of Participation in the Domestic Market. The House Report also addresses the particular issue of effects abroad resulting from anticompetitive conduct in the domestic market. After reiterating that Congress' intent was to "exempt from the antitrust laws *conduct* that does not have the requisite domestic effects," the House Report states that this test is not intended to "exclude all persons injured abroad from recovering under the antitrust laws of the United States." *Id.* at 10.

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concerning the scope of U.S. antitrust jurisdiction and the jurisdiction-limiting nature of the legislation. That report stated: "The[] [FTAIA] modif[ies] the Sherman Act * * * to require a 'direct, substantial, and reasonable [sic] foreseeable' effect on commerce in the United States, or on the export commerce of a U.S. resident, *as a jurisdictional threshold* for enforcement." H.R. Conf. Rep. No. 97-924, at 29-30 (1982) (emphasis added).

In a passage much trumpeted by the respondents and by the majority below, the Report goes on to state:

> A *course of conduct in the United States—e.g.* price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. [*Id.* (first emphasis added).]

The panel majority's reliance on brief quotations from this discussion is misplaced. The meaning, in context, is clear: foreign purchasers who are injured as a result of purchases *involving their participation in the U.S. domestic market* are protected by U.S. antitrust law just like domestic purchasers. This is a far cry from concluding that purely foreign transactions may trigger jurisdiction—a result antithetical to the purposes of the FTAIA. That this anti-discrimination principle is the meaning of the section is clear both from the reference to a "course of conduct *in the United States*," and from the sentences that immediately follow:

> Foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce, and Navigation treaties this country has entered into with a number of foreign nations. [*Id.* (emphasis added).]

The House Report again makes this point later in the section when it states that the FTAIA "preserve[s] antitrust protections *in the domestic marketplace* for all purchasers regardless of nationality or the situs of the business." *Id.* (emphasis added). The Report thus cannot reasonably be read to suggest that foreign effects unrelated to participation in the U.S. domestic market may provide a basis for jurisdiction over a foreign plaintiff's claim. As one district court noted while interpreting this piece of legislative history, "[i]t

does not say that jurisdiction exists if the plaintiff actually makes a purchase abroad and does not otherwise participate in the U.S. market." *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001). "Nothing is said about protecting foreign purchasers in foreign markets." *Id.* *Accord Den Norske Stats Oljeselkap As* v. *HeereMac Vof*, 241 F.3d 420, 429 n.28 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) ("*Statoil*").[7]

Given Congress' repeated intent to safeguard domestic markets, it makes sense that Congress would intend to protect anyone, including foreign purchasers, if they are participating *in the U.S. market*. Any more expansive interpretation of this section—to cover foreign purchasers engaging in wholly foreign transactions—is impossible to square with the text of the statute and with the full legislative history. Indeed, the fact that Congress felt the need to clarify that foreign purchasers *are* protected if in the U.S. market is further evidence that it did *not* intend to protect those purchasers with respect to foreign transactions.

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[7] That this portion of the Report goes on to address this Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), and its deterrence rationale proves the point. The Report notes that the interest in ensuring adequate deterrence under U.S. law, as discussed in *Pfizer*, supports "preserving the rights of foreign persons to sue under our laws *when the conduct in question has substantial nexus to this country*." *Id.* (emphasis added).

Pfizer was on all fours with the situation addressed by this language—foreign plaintiffs injured as a result of purchases in the domestic market. *Pfizer*, however, was limited to addressing whether foreign sovereigns so injured were "persons" entitled to sue under Section 4 of the Clayton Act, 15 U.S.C. § 4, *see Pfizer*, 434 U.S. at 314-320, and *Pfizer* did not speak to the subject-matter jurisdiction of federal courts over foreign transactions or the expansion of U.S. antitrust jurisdiction to reach claims based on wholly foreign transactions. *See Statoil*, 241 F.3d at 430 (noting limited nature of *Pfizer* holding).

Domestic Impact, and the "Give Rise to A Claim" Requirement. In explaining the type of "domestic impact" that will trigger U.S. jurisdiction, the House Report contradicts the D.C. Circuit's interpretation of the meaning of Section 6a(2). The Report explains that the Committee not only wanted to ensure that the domestic effects required for jurisdiction were anticompetitive, but also that those effects were the basis for a foreign plaintiff's claim. House Report at 11-12.[8]

In response to a suggestion from the American Bar Association that might have supported a contrary interpretation, the House Committee stated:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to *require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws*. [*Id.* (emphasis added).]

Therefore, precisely in order to avoid the result urged by the respondents in this case—where the alleged jurisdiction-triggering domestic effect is unrelated to a foreign plaintiff's claim—the Committee added the requirement that the domestic effect be "the basis for the injury alleged." *Id.* at 12.

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[8] The House Report reiterates that the FTAIA only addresses "the subject matter jurisdiction of United States antitrust law," and does not otherwise alter "current antitrust law." *Id.* at 13. Therefore, the FTAIA was not intended to "alter existing concepts of antitrust injury or antitrust standing." *Id.* at 11. Nor did Congress intend to change the "legal standards for determining whether conduct violates the antitrust laws." *Id.* at 13.

Although this straightforward language employed by the Committee did not appear in the final version of the statute, the intent of the legislators did not vary. As finally enacted, Section 6(a)(2) provides that jurisdiction exists only where the domestic effect "gives rise to a claim" under the Sherman and Clayton Acts. As explained by Chairman Rodino in his statement attached to the House Report, however, the intended result was the same. *Id.* at 18.

Chairman Rodino's explanation for this substitution provides the only insight in the legislative history into the meaning of the "gives rise to a claim" requirement. He explained that this phrase was added as a "minor clarification" to the legislation reported from Committee and was intended only to "improve the language of the Committee's [reported] version" of the bill. *Id.* He explained:

> The reported version requires that the effect upon domestic commerce or a domestic export opportunity be "the basis of *the* violation alleged * * *." As explained more fully in the Committee's Report, the Committee added this language to make it *absolutely clear that the basis for American antitrust jurisdiction* has to be a domestic *anticompetitive* effect. [*Id.* (first emphasis added).]

Chairman Rodino explained that he "believe[d] that it [was] possible to improve the language of the Committee's version by substituting the phrase 'such effect gives rise to a claim' under the provisions of the Sherman Act." *Id.*

Therefore, the "give rise to a claim" language, which the Second and D.C. Circuits interpret as greatly expanding U.S. antitrust jurisdiction, was intended to do exactly the opposite. Chairman Rodino explained that "[t]he substituted language accomplishes the *same result* as the Committee version and is better, in my view, because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." *Id.* (emphasis added). In light of this explanation, the exceedingly fine line drawn by some between the

use of the indefinite article "a" rather than the definite article "the," *see, e.g., Statoil*, 241 F.3d at 432-433 (Higginbotham, J., dissenting), is truly a distinction that was intended to be without a difference. The framers of the legislation quite clearly intended to limit U.S. antitrust jurisdiction to those instances where the specific violation alleged by the plaintiff involved a domestic effect.

When taken together, the full Judiciary Committee's explanation for adding a requirement that domestic effect must be the "basis for the injury alleged," *see* House Report at 12, and Congressman Rodino's explanation for changing that language in order to require that the domestic effect "give rise to a claim," *see id.* at 18, reveals the error in the respondents' arguments and in the Court of Appeals' decision in this case. The "gives rise to a claim" requirement of Section 6a(2) was intended to make "*absolutely clear* that the *basis* of American antitrust jurisdiction has to be a domestic anticompetitive effect." *Id.* at 18 (first emphasis added). Indeed, this language was intended to require that "the jurisdictional nexus must also be the *basis* for the injury alleged" by the foreign plaintiff. *Id.* at 12 (emphasis added).

This interpretation of the House Report's "domestic impact" discussion is entirely consistent with the jurisdiction-limiting purposes for the FTAIA. And this conclusion is not undermined by the remaining sentences in the Committee's discussion of the requisite "domestic impact." *Id.* The Committee stated that its requirement that the jurisdiction-triggering domestic effect be the basis for a foreign plaintiff's claim "does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States." *Id.* at 12. The House Report continues:

> *As previously set forth*, it is sufficient that *the conduct providing the basis of the claim* has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an impact,

> on an export opportunity of a person doing business in the United States. [*Id.* (emphasis added).]

Rather than create an exception that swallows the previously-announced rule that a foreign plaintiff's claim must be based on the jurisdiction-triggering domestic effect, the Committee merely referred back to the immediately preceding section concerning the protections offered to foreign purchasers, regardless of the location of injury, while they are participating in the domestic market. *See id.* at 10-11. In other words, where a foreign entity engages in purchases in the United States, it will not be deprived of an antitrust remedy in this country simply because the financial loss may have been experienced abroad. By contrast, the framers of the FTAIA consistently made clear that where, as here, a foreign entity has engaged in wholly foreign transactions, U.S. antitrust jurisdiction will not extend to such conduct.

The House Report's discussion of the requisite "domestic impact," together with Congressman Rodino's explanation for his substitution of the language in Section 6a(2) for that employed by the full Committee, reveals that Congress intended to *limit* jurisdiction over foreign plaintiffs' claims to those *based* on domestic, anticompetitive effects. Because the foreign injuries forming the basis of the respondents' claims in this case are unrelated to any domestic effects, the Court of Appeals erred in upholding U.S. jurisdiction.

International Cartels. Finally, and significantly, the House Report addresses the concern that the restrictions imposed on the exercise of U.S. antitrust jurisdiction might encourage the creation of international cartels. *Id.* at 13. Although the Committee considered this "[p]robably the most important criticism" of the legislation, it explained that "after weighing this and similar arguments carefully," it concluded that it did "not believe the legislation [would] result in rejuvenation of international cartels." *Id.* The Committee continued:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country * * * the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce. [*Id.*]

The Committee further explained that its concerns in this regard were alleviated by the "increased sensitivity of other nations to antitrust considerations and cartel activity," and noted that "[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] *in no way limits ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory*." *Id.* at 13-14 (emphasis added).

In this section, the Committee clearly revealed that it did not intend for global cartels—like the one alleged in this case—to automatically fall within U.S. antitrust jurisdiction. Instead, unless such cartels give rise to a plaintiff's claim that is based on the U.S. effects of the anticompetitive conduct, such cartels are not the concern of U.S. law.

* * *

When viewed as a whole, the FTAIA's legislative history contradicts the D.C. Circuit's "less restrictive" interpretation of this statute, *Empagran*, 315 F.3d at 355, which would expand U.S. law beyond previously recognized limits to cover the claims of foreign plaintiffs injured as a result of the foreign effects of foreign transactions with no connection to the United States. This history paints a clear picture of Congress' intent to curb the reach of U.S. antitrust law, to remove from U.S. antitrust scrutiny claims not based on domestic market effects, and to aid businesses engaged in foreign trade by providing clear and predictable standards for

determining when particular transactions will be subject to U.S. antitrust jurisdiction. The Court of Appeals' decision undermines each of these objectives.

II. THE DECISION BELOW THREATENS THE ALLOCATION OF ANTITRUST JURISDICTION INTENDED BY CONGRESS.

When it enacted the FTAIA, Congress contemplated a truly international antitrust regime, under which U.S. courts and authorities would limit their focus to claims based on effects within domestic markets, and foreign nations would police their own markets. By allocating authority in this way, and drawing clear lines concerning the scope of U.S. jurisdiction, Congress intended to encourage other nations to develop effective antitrust laws, to alleviate hostility and replace it with greater cooperation between U.S. and foreign antitrust authorities, and to decrease uncertainty and the risk of overlapping and inconsistent standards for the foreign transactions of multinational corporations. The notable successes in each of these areas following passage of the FTAIA are threatened by the D.C. Circuit's decision, which would effectively install the U.S. as the world's antitrust court. *See* Patti Waldmeir, *Should America Be the World's Price-Fixing Policeman?*, Fin. Times, Dec. 22, 2003, at 7. This approach will harm global competition by interfering with the cooperative international enforcement of international antitrust laws encouraged by the FTAIA. Moreover, the decision will reintroduce uncertainty for multinational businesses with respect to applicable law, and create the possibility that transactions will be subject to overlapping and conflicting antitrust standards. The FTAIA was intended to avoid these problems.

1. Increased International Enforcement. Through the FTAIA, Congress not only clarified the limited reach of U.S. antitrust laws, but also encouraged more effective international antitrust enforcement by assigning to other nations an

implicit role in antitrust enforcement. Congress was aware that expansive application of U.S. antitrust jurisdiction up until that point had resulted in hostility and tension with our trading partners, with negative effects for U.S. enforcement efforts and businesses. For example, Chairman Rodino acknowledged that "many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws," prompting some to "enact[] laws to block our enforcement efforts." *House Hearings* at 1. Accordingly, one of the intended benefits of the legislation was that "[s]ome foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners." *Id.* at 2.

Several witnesses agreed on the need for Congress to clearly demarcate the areas within which the U.S. and its trading partners would have authority, both in order to alleviate tensions and to encourage greater regulation abroad. As James Atwood explained to the House Committee:

> [T]he political difficulties which U.S. antitrust enforcement have caused from time to time have been exacerbated by this foreign market effects application of U.S. law. To redefine and clarify our law so that foreign market effects are carved out and made the responsibility of foreign law is, I think, a positive development in ameliorating the international political tension that now exists in the area of antitrust enforcement. * * *
>
> I think over time this allocation of enforcement responsibility would be a very healthy thing, if for no other reason because *it will encourage the development of foreign antitrust programs* that will be similar to ours. It will make more understandable to foreign governments some enforcement actions which the Justice Department properly must take from time to time in international trade, and *will bring about over time a better, clearer, and more*

effective regime of antitrust cooperation across borders. [*Id.* at 84-85 (emphasis added).]

Commissioner Pitofsky expressed similar views to the Senate Judiciary Committee, noting that other countries can regulate transactions no longer within American antitrust jurisdiction and stating that "[w]e have seen developments in foreign antitrust law in the last 10 or 15 years, and we know that those law are being enforced more vigorously." *Senate Hearings* at 25-26.

Accordingly, Congress sought to "clarify" U.S. antitrust laws in order to "make explicit their application only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce," thereby both limiting the extraterritorial reach of U.S. law and providing a "single, objective test" for determining when U.S. antitrust law applies. House Report at 2-3. [9] At the same time, however, Congress emphasized that the more limited role of U.S. antitrust authorities could and should be complemented by antitrust enforcement by foreign authorities.

Congress adopted this allocation of responsibility with the knowledge that other countries were already demonstrating "increased sensitivity * * * to antitrust considerations." *Id.* at 13. The House Judiciary Committee emphasized that "[b]y

[9] The FTAIA's sponsors likewise endorsed this allocation of authority. Congressman McClory stated that "[i]n graphic terms, [the FTAIA] draws a circle around the antitrust laws and states that nothing outside the circle is covered." 128 Cong. Rec. at 18953. Senator Thurmond likewise explained that "the purpose [of U.S. antitrust laws] is to protect our domestic markets and our consumers * * * [and] there is no good reason to have our antitrust laws applicable to export transactions where direct and substantial domestic anticompetitive effects are nonexistent," but that "this bill does not and should not try to relieve American business from compliance with the antitrust laws of other countries." *Senate Hearings* at 1.

more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory," but instead that it hoped that the "the clarified reach of our own laws could *encourage our trading partners* to take more effective steps to protect competition in their markets." *Id.* at 13-14 (emphasis added); *see also id.* at 10 (in discussing the foreign effects of U.S. exports, the House Committee concluded that U.S. antitrust law would not apply, but that "[f]oreign buyers injured by such export conduct would have to seek recourse in their home courts").

Since the FTAIA was enacted in 1982, the international antitrust landscape has changed dramatically with the widespread proliferation of international antitrust laws and enforcement authorities. In 2000, the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust ("ICPAC") issued a final report discussing at length the dramatic increase in international antitrust efforts. In that report, ICPAC noted that over 80 countries then had antitrust laws in place, and that an additional 20 were in the process of drafting such laws. ICPAC Final Report at 33 (Dep't of Justice 2000) <http://www.usdoj.gov/atr/icpac/finalreport.htm>. These nations account for "nearly 80% of world output and 86% of world trade." *Id.* The report notes that approximately 60 percent of other countries' antitrust laws were introduced in the 1990s, after the enactment of the FTAIA. *Id.* Although the emergence of foreign antitrust enforcers "has not meant a uniformity of substantive rules or institutional approaches," *id.*, "the international community has made * * * headway in increasing cooperation and networking among the competition agencies of the world." *Id.* at 36.

This has been particularly true in policing international cartels, such as the one alleged in the case, and in reviewing mergers. *Id.* As the ICPAC Report concluded:

> These cooperative efforts are a welcome change from the early years of the postwar period, when U.S. attempts to apply its antitrust laws to address offshore practices seen as harming the U.S. economy led to instances of sharp conflict with other sovereigns. Today, there is far less conflict between jurisdictions, and in the last decade there have been few, if any, instances of countries invoking statutes such as blocking and clawback laws to impede the United States in its efforts to prosecute transnational antitrust cases. [*Id.*]

The ICPAC also heralded the increased availability of "positive comity," particularly in connection with the European Commission, "whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy." *Id.* at 36-37.

Thus, prior to the unwarranted expansion of antitrust jurisdiction recently wrought by the Second and D.C. Circuits, the FTAIA had worked as Congress had hoped. By limiting U.S. antitrust jurisdiction to its properly-circumscribed sphere, the United States encouraged a remarkable proliferation and expansion of competition laws throughout the world, while fostering enhanced cooperation between international antitrust authorities. As the ICPAC Report makes clear, the effect of this increased cooperation is *improved* enforcement of antitrust laws around the world.

The D.C. Circuit's decision in this case threatens the continued development of an international antitrust regime with complementary (though not identical) enforcement authority allocated around the world. The decision threatens to roll back the "welcome change" discussed in the ICPAC report, and to again engender hostility against U.S. antitrust enforcement. Rather than increasing deterrence, the court's

decision will harm global competition by undermining cooperative efforts by the world's antitrust authorities.[10]

2. Reintroduction of Uncertainty. The recalibration of antitrust authority that would result from the D.C. Circuit's decision also has significant practical consequences for multinational businesses, like many of The Business Roundtable's members. As Congress made clear when it passed the FTAIA, one purpose of the Act was to alleviate the uncertainty for businesses and to prevent the application of overlapping and possibly conflicting regulation:

> With these changes, H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in the United States export trade from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors. To be sure, if the foreign state in question has an antitrust regimen, American-owned firms must still comply. But no longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership. [House Report at 10.]

Despite Congress' belief that, through the FTAIA, it was "freeing" businesses "from the possibility of dual and conflicting antitrust regulation," *id.*, the D.C. Circuit's decision clears the way for the exercise of U.S. jurisdiction to claims based solely on the foreign effects of alleged anticompetitive conduct. Therefore, even with respect to purely foreign

---

[10] This case is strong evidence of the effectiveness of the current international regime. The petitioners have paid well over $3 billion to governments and private plaintiffs as a result of the alleged conspiracy. The efforts of international authorities and plaintiffs have contributed significantly to this effort.

transactions having no substantial connection to the United States, businesses will be forced to take into account the possibility that U.S. antitrust laws will be applied. And while there undoubtedly has been considerable convergence in the substantive rules applied by U.S. and foreign antitrust authorities, there continue to be differences, for example, in the areas of merger enforcement, and dominant firm conduct. To the extent that unduly broad U.S. antitrust jurisdiction undermines cooperation and comity between U.S. and foreign antitrust enforcers, the result is likely to be inconsistent results in enforcement proceedings and increased delays in merger clearance decisions. *Cf.* William J. Kolasky, *United States and European Competition Policy: Are There More Differences Than We Care to Admit?* <http://www.usdoj.gov/atr/public/speeches/10999.htm>.

Moreover, in light of the jurisdictional test adopted by the D.C. Circuit, uncertainty concerning the applicability of U.S. antitrust law will be the rule and not the exception. Under that court's decision in this case, U.S. jurisdiction will depend not on the foreseeable consequences of any particular transaction, but instead on an unpredictable post hoc assessment by a court of the existence of a hypothetical claim by a hypothetical plaintiff related to some generalized conception of the conduct at issue. This is a recipe for uncertainty.

In adopting this approach, the D.C. Circuit provided no clue as to how the existence of such "a claim" could or should be tested. This hypothetical claim would have to be the subject of a trial within the trial of the defendant—all for the purpose of determining the threshold jurisdictional issue. And even assuming that such a determination might be possible in a case involving a global price fixing conspiracy, it is hard to imagine how that determination could be made in the context of many other, less clear cut Sherman Act claims—for example, rule of reason claims, or claims asserting a breach of duty by a firm with monopoly power, *see Verizon Communications, Inc.* v. *Trinko*, 124 S. Ct. 872, 879

(2004) (discussing difficulty of identifying anticompetitive conduct by a single firm). Surely this is not the type of threshold jurisdictional test that Congress had in mind when it spoke of the "single, objective test" or "clear benchmark" embodied by the FTAIA. House Report at 2-3. The test Congress adopted was to be "simple and straightforward" and was to reduce uncertainty for "businessmen, attorneys and judges." *Id.* The approach taken by the D.C. Circuit, in the name of deterrence, defeats any hope of achieving certainty concerning the scope of U.S. antitrust jurisdiction.

Rather than inviting federal courts to engage in the D.C. Circuit's unworkable approach for determining U.S. jurisdiction over claims based on the foreign effects of foreign transactions, this Court should follow the plain language of the FTAIA and the intent of its drafters, and recognize that federal courts have no business policing wholly foreign transactions under the antitrust laws.

CONCLUSION

For the foregoing reasons and those set forth in the petitioners' brief, the Court should reverse the judgment below.

Respectfully submitted,

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In the Supreme Court of the United States

F. HOFFMAN-LAROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN, S.A., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 3

A. The FTAIA and Global Forum Shopping 3

B. The Proceedings Below and in *Kruman* 6

C. The International Concern Caused by this Case and *Kruman* 9

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. The Holding of the D.C. Circuit Should Be Reversed Because it Ignores, and Undermines, Decades-Old Understandings of Antitrust Standing Rules 13

II. The FTAIA Limits the Subject-Matter Jurisdiction of U.S. Courts Applying U.S. Antitrust Laws, and Does Not Permit Suits by Foreign Plaintiffs Alleging Injury from Wholly Foreign Effects 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world. Like the Chamber, and sometimes together with the Chamber, OFII regularly files briefs as *amicus curiae* in cases such as this one that raise issues of vital concern to the global business community.

Amici Chamber and OFII are well situated to brief the Court on the views of member companies collectively responsible for a substantial portion of total U.S. economic activity with respect to the issues on which the Court has granted

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

certiorari. Those members and their corporate affiliates include companies that are buyers and sellers of goods imported into the United States, buyers and sellers of goods exported from the United States, and buyers and sellers in commerce occurring wholly within the United States as well as wholly outside of the United States. In an era of increasing global trade, *amici*'s members share a common interest in the development and preservation of stable and predictable international and domestic laws that allow them to conduct business around the globe.

That interest is threatened by the decision below and by the decision in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002). In both cases, plaintiffs alleged injuries arising in foreign commerce, *i.e.*, injuries resulting from sales to foreign purchasers that occurred in foreign countries.[2] Under well-established principles of antitrust standing, such injuries do not give rise to claims that may be heard in United States courts, because they are not "injur[ies] of the type the antitrust laws were intended to prevent." *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977). Moreover, the Second and D.C. Circuits erred in holding that U.S. courts have subject-matter jurisdiction to entertain such cases, even though the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, limits the jurisdiction of U.S. courts to cases in which plaintiffs' injuries arise from effects on U.S. commerce.

This expansion of antitrust standing and subject-matter jurisdiction, if affirmed, would increase global forum shopping. Plaintiffs – or more accurately, plaintiffs' counsel – will seek to turn U.S. district courts into world antitrust courts. If successful, their efforts will expose multinational businesses to unprecedented potential antitrust liability, or, even worse, to enormous "blackmail settlements" (in the words of Judge Friendly) – the arguable result in *Kruman*, in which certiorari was dismissed after the parties settled, rather than face continued uncertainty. See *Christie's Int'l PLC* v. *Kruman*, No. 02-340, cert. dismissed, 124 S. Ct. 27 (2003). Litigation of this kind will divert the resources of federal courts to cases that have no real effect on U.S. interests, but that have substantial effects on the interests of foreign governments, foreign producers, and foreign consumers. U.S. intrusion into such matters will increase diplomatic friction and disputes with foreign countries and, in the considered judgment of Executive Branch agencies, will undermine U.S. efforts to deter violations of the antitrust laws and to secure international cooperation to enforce the antitrust laws.

[2] As it happens, both cases have involved foreign sellers as well as foreign purchasers and transactions. Under our analysis of the FTAIA and related antitrust principles, however, a foreign plaintiff injured in a wholly foreign transaction may not bring a U.S. antitrust suit even against a U.S. seller.

STATEMENT

A. The FTAIA and Global Forum Shopping

Fearful that extraterritorial application of the U.S. antitrust laws could unduly impinge on the efforts of U.S. business to compete globally, and cognizant of the international comity ramifications of thoughtless extraterritoriality, Congress in 1982 enacted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (FTAIA). The FTAIA was based largely on a recommendation by the Reagan Administration to *limit* the extent to which U.S. antitrust laws would apply to conduct involving trade or commerce with foreign nations. The FTAIA was a congressional response to international friction generated by expansive assertions of U.S. antitrust jurisdiction and to "complaints from American firms that the antitrust laws impaired their ability to increase exports through aggressive competition or cooperation." *The 'In' Porters, S.A.* v. *Hanes Printables, Inc.*, 663 F. Supp. 494, 498 (M.D.N.C. 1987); see also *Foreign Trade Antitrust Improvements Act: Hearings Before the House Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 97th Cong., 1st Sess. (Apr. 8, 1981) (testimony of Martin F. Connor on behalf of the Business Roundtable) ("This uncertainty [about the reach of U.S. antitrust laws] affects the ability of American businesses to enter into international transactions

that would be highly beneficial and to compete effectively with foreign companies for a share of world markets.").

Amending the Sherman Act, the FTAIA provides (15 U.S.C. § 6a):

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect —
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Since its enactment, plaintiffs have endeavored to chip away at the FTAIA's prohibition on the exercise of antitrust jurisdiction over foreign transactions with wholly foreign effects, asking courts to "expand the scope of the U.S. antitrust laws." Pet. App. 52a. See, *e.g.*, *Den Norske Stats Oljeselskap As* v. *HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001); *Information Resources, Inc.* v. *Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411 (S.D.N.Y. 2000); *The 'In' Porters*, 663 F. Supp. 494; *Liamuiga Tours, Div. of Carribean Tourism Consultants, Ltd.* v. *Travel*

Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985); *deAtucha* v. *Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985); *Eurim-Pharm GmBH* v. *Pfizer, Inc.*, 593 F. Supp. 1102 (S.D.N.Y. 1984). The U.S. judicial system has many features that make suit in the United States more attractive than in foreign jurisdictions. See, *e.g.*, *Piper Aircraft Corp.* v. *Reyno*, 454 U.S. 235, 247 (1981) (more favorable U.S. tort laws are not a basis for suing in the U.S. for an airplane crash with no other connection to that forum); *Intel Corp.* v. *Advanced Micro Devices*, No. 02-572, cert. granted, 124 S. Ct. 531 (2003) (Ninth Circuit holding that 28 U.S.C. § 1782 permits mere complainants before foreign law-enforcement bodies to obtain discovery of their competitors by order of a U.S. District Court, even though no such discovery is allowed under the law of the relevant foreign jurisdiction). The attraction to U.S. courts is particularly strong in the antitrust context, where plaintiffs can take advantage of "jury trials, wide-ranging pretrial discovery without judicial supervision, enforcement by private plaintiffs, extraterritorial discovery, treble damages, class actions, [and] contingent fees." Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 516 (1998). "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd.* v. *Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning).

These enticing features are exactly what drew plaintiffs in this case to sue in U.S. courts, rather than suing in the respective foreign jurisdictions – the Ukraine, Panama, Ecuador, and Australia – in which their injuries occurred. See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003 (quoting respondents' counsel Paul Gallagher). Unless courts adhere to the limitations embodied in traditional principles of antitrust standing and in the scope of jurisdiction under the FTAIA, U.S. courts will attract litigants from around the world. "[A]ny entities, anywhere, that were injured by any conduct that

also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *HeereMac*, 241 F.3d at 427-428.

B. The Proceedings Below and in *Kruman*

First *Kruman*, and then the decision below, have upset the balance in global antitrust enforcement by permitting U.S. antitrust laws, judicial procedures, and remedies to be invoked by foreign plaintiffs against foreign defendants for injuries suffered in transactions occurring in foreign countries.

Kruman arose from the corporate leniency policies of the Antitrust Division, under which the first firm to break from a cartel and cooperate in the prosecution of other cartel members may escape criminal prosecution by the Justice Department. See Pet. App. 78a. Using this policy, the Antitrust Division uncovered and successfully prosecuted price-fixing agreements among auction houses. See *In re Sotheby's Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 91,059 (S.D.N.Y. Aug. 31, 2000) (noting that Christie's International PLC disclosed the price-fixing agreement). "This [FTAIA] issue has arisen precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years." Assistant Attorney General R. Hewitt Pate, *Anti-Cartel Enforcement, the Core Antitrust Mission* 10 (May 16, 2003), available at http://www.usdoj.gov/atr/public/speeches/201199.pdf. See also Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 270-271 (2003) (crediting the leniency policy with the majority of U.S. cartel enforcement successes in recent years). Substantial criminal fines and jail sentences for the participants and their officers were imposed.

As often is the case with Antitrust Division anti-cartel enforcement efforts, private plaintiffs promptly brought "tag-along" actions, seeking treble-damages recovery under Clayton Act § 4, 15 U.S.C. § 15. See *Kruman*, 129 F. Supp. 2d at 622.

Similarly in the vitamins case now before the Court, governmental civil and criminal actions (both here and abroad) were followed by claims by domestic plaintiffs, claiming injury arising from the effect of the conspiracy on U.S. commerce, that are pending in a separate action in the D.C. District. Pet. App. 8a. At least some of the defendants and domestic plaintiffs have reached settlement agreements. See *In re Vitamins Antitrust Litig.*, No. 99-mc-00197-THF. In *Kruman*, the domestic plaintiffs and the defendants reached a settlement agreement. *Kruman*, 284 F.3d at 390. Thus, both in this case and in *Kruman*, the claims of the foreign plaintiffs claiming injury arising from wholly foreign effects have been separated from the claims brought by domestic plaintiffs.

The district courts for both the Southern District of New York and the D.C. District dismissed the claims by the foreign plaintiffs in their respective cases, on the grounds that the FTAIA excludes from the jurisdictional reach of the Sherman Act claims based on wholly foreign effects. Pet. App. 49a, 52a; *Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001). Neither district court addressed the question of antitrust standing.

On March 13, 2002, the Second Circuit reversed the holding by the district court for the Southern District of New York, for the first time since the enactment of the FTAIA holding that U.S. antitrust law extends to foreign plaintiffs with injuries arising from wholly foreign effects of anticompetitive conduct. *Kruman*, 284 F.3d at 390, 399-400. Less than a year later, the D.C. Circuit followed suit. "We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." Pet. App. 20a. The court below expressly rejected the contrary holding by the Fifth Circuit in *HeereMac* (Pet. App. 20a), that the FTAIA permitted suit only by plaintiffs injured in domestic U.S. commerce.

The *Kruman* court reached the extreme conclusion that jurisdiction was available under the FTAIA based on a completely abstract U.S. "effect," even if *no* plaintiff could claim an *injury* arising from an effect on domestic U.S. commerce. 284 F.3d at 400 ("Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect violate the substantive provisions of the Sherman Act."). And, like the district court decision that it reversed, the Second Circuit nowhere addressed this Court's antitrust standing requirement from *Brunswick*, that suit is permitted only if the injury alleged is "of the type the antitrust laws were intended to prevent." 429 U.S. at 489.

The D.C. Circuit in this case took a view "somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. 20a. The court held that, if *some* plaintiff had a claim arising from an effect on domestic U.S. commerce, *any* plaintiff could sue alleging injury from the violation based on effects felt *anywhere* in the world. *Ibid.* ("The conduct's domestic effect * * * need not necessarily give rise to the particular plaintiff's (private) claim."). Therefore, although the plaintiffs claiming injury from domestic effects were not part of the appeal to the D.C. Circuit, jurisdiction existed over claims by the foreign plaintiffs, alleging injury from wholly foreign effects. *Id.* at 33a.

The court advanced three primary rationales. First, based on what it viewed as the literal interpretation of the word "a," the majority read the phrase in Section 6a(2), "gives rise to a claim," to mean that *any* claim – whether or not part of the same action – must confer jurisdiction. Pet. App. 20a. Second, on the basis of legislative history indicating that the situs of the conduct at issue – and the nationality of the plaintiffs – did not alter the jurisdictional analysis, the majority concluded that the location of the *effects* giving rise to the plaintiffs' claims was irrelevant. *Id.* at 28a-29a. Third, the majority relied on a deterrence rationale. *Id.* at 33a.

Judge Henderson dissented, interpreting the FTAIA by reference to a "more natural" interpretation of the "plain language" of Section 6a(2). Pet. App. 40a, 42a. In her view, "gives rise to a claim" refers to the claim brought by the plaintiff before the court. She read the same legislative history cited by the majority as unambiguous: "'[T]he "effect" providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws.'" *Id.* at 40a (quoting H.R. REP. NO. 97-686, at 11-12 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496-2497). Judges Sentelle and Randolph joined Judge Henderson in voting for *en banc* rehearing.

Apart from its reading of the FTAIA that expanded the jurisdictional reach of the Sherman Act, the D.C. Circuit also held that the FTAIA amended the antitrust standing doctrine. The court held that, because the "global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue" (*id.* at 35a) – announcing a new derivative standing rule. Thus, according to the court below, both jurisdiction and standing can be considered derivative rights, supported by reference to someone other than the plaintiff: "[T]he plaintiff must" only "allege that *some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's" antitrust violation. Pet. App. 23a (emphasis added). Because the *Kruman* court did not discuss standing, the court below is the only court, since the enactment of the FTAIA, to have held that foreign plaintiffs not injured in domestic commerce have *standing* to sue under the U.S. antitrust laws.

C. The International Concern Caused by this Case and *Kruman*

The U.S. government, foreign governments, and multinational businesses are alarmed at the expansive decisions of the Second Circuit and the court below. The Antitrust Division, Federal Trade Commission, and Solicitor General filed a brief urging rehearing *en banc* by the D.C. Circuit. The U.S.

government – arguing that the Fifth Circuit correctly interpreted the FTAIA in *HeereMac* (Pet. App. 74a) – expressed special concern that the D.C. Circuit's decision would *undermine* cartel-enforcement efforts by the Antitrust Division (*id.* at 77a-79a). Participants in price-fixing conspiracies will be deterred from availing themselves of the corporate leniency policy (see p. 6, *supra*) because the certainty of overwhelming civil liability to a worldwide purchaser class is a greater concern than the possibility of criminal liability if a conspiracy is detected by the Antitrust Division. *Id.* at 79a. "By permitting suits for treble damages by foreign plaintiffs whose injuries arise from conduct *outside U.S. commerce*, the present appellate majority view may create a potentially serious disincentive for corporations and individuals to report antitrust violations under our Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement." Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 9 (Nov. 18, 2003) (*Delrahim Remarks*), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf. Respondents' counsel recognizes that this is no idle concern: "'It's a very, very significant case in terms of the implications for both domestic and foreign companies that do business in the United States,' says Paul T. Gallagher, the plaintiff's lawyer. * * * 'It really increases the potential downside, the potential damages that a foreign defendant is exposed to in a U.S. court.'" Michael Freeman, "Here Comes Treble," *Forbes*.com, Aug. 27, 2003, available at http://www.cmht.com/casewatch/cases/itnTreble.html.

The Antitrust Division also has expressed concern that such extraterritorial assertions of jurisdiction will interfere with the conduct of U.S. international relations, which the Constitution commits to the political branches. "The more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries."

Delrahim Remarks 8. This, too, is a very real and pressing concern. "[J]ust last month when I participate[d] in the OECD's forum in Paris, I was shocked by the level of attention and concern the *Empagran* line of cases have attracted in the international community." *Id.* at 9-10. The Federal Republic of Germany filed a brief with this Court urging a grant of certiorari in this case. Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Petition for a Writ of Certiorari in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, No. 03-724. That government pointed out that Germany and the European Union have sophisticated antitrust enforcement regimes and great regulatory interest in seeing their laws, not those of the United States or other countries, applied to conduct affecting commerce in Germany and the European Union. *Id.* at 1-2.

Foreign governments historically have lashed out against aggressive extraterritoriality. Australia, one of the countries whose own antitrust enforcement scheme has been shunted aside by the D.C. Circuit in this case, has a "blocking statute" that allows the blocking of the enforcement of foreign antitrust judgments. 1 SPENCER W. WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.17 (3d ed. 1997). Moreover, Australia employs "clawback" provisions that create a cause of action to recover money paid under a foreign antitrust judgment deemed by Australia to be unenforceable. *Ibid.* The United Kingdom likewise has defensive statutory provisions to protect persons doing business in the United Kingdom from foreign antitrust overreaching. *Ibid.* (citing the Protection of Trading Interests Act of 1980, 21 I.L.M. 834, 835, 836-837 (1982)).

Finally, the decisions in *Kruman* and in this case present a threat to international businesses like members of *amici*. Imposing antitrust liability for wholly foreign effects potentially disadvantages international business – or at least reverts to the state of uncertainty that existed prior to the enactment of the FTAIA (see pp. 3-4, *supra*) – and discourages foreign companies from investing in U.S. operations, and U.S. companies from

engaging in foreign commerce. Both results have serious ramifications for domestic U.S. economic activity.

SUMMARY OF ARGUMENT

Respondents lack standing because they suffered no injury "'by reason of' that which made [petitioners' alleged conduct] unlawful." *Brunswick*, 429 U.S. at 488. The domestic, not the foreign, effects render the price fixing at issue a violation of U.S. antitrust law. A causal relationship is not enough to create antitrust standing, which turns on the nature of the *plaintiffs'* alleged injury, not someone else's.

Antitrust standing principles reflect the teachings of the larger body of standing law, which operates to ensure that the proper party is suing. In this area of standing law, as in all others, one cannot determine standing by focusing on the rights of persons not before the court *or* on the legality of the underlying conduct.

The prudential considerations that underlie standing doctrine have special force in this case. Potentially complex antitrust litigation to determine whether someone *not* before the court has suffered injury in the United States is highly undesirable, as are efforts to deal unnecessarily with witnesses and discovery outside the United States and problems of avoiding duplicate recoveries under U.S. law and the laws of other jurisdictions.

The court below misconstrued the FTAIA as well. The dissent below and the Solicitor General have advanced a reading of Section 6a's text that is both more natural and more consonant with the settled presumption against reading statutes to have extraterritorial effect. Respondents' and the D.C. Circuit's reading collides with the undisputed purpose of the FTAIA to *limit* extraterritorial assertions of U.S. antitrust jurisdiction.

The hyper-emphasis by the D.C. Circuit on the single word "a" preceding "claim" is unfaithful to this Court's teachings about how to read a statute as a meaningful text, rather than a

mere collection of words. The D.C. Circuit's policy argument that its interpretation would enhance deterrence is, if possible, even worse, elevating one goal of the antitrust laws above all other considerations *and* getting the deterrence calculus almost exactly backward. Furthermore, the D.C. Circuit's interpretation renders subsection (2) of Section 6a redundant.

The legislative history further supports petitioners' position, not respondents'. In particular, the very passage on which the D.C. Circuit erroneously relied makes clear that Congress's intent to protect foreign purchasers was limited to their activities *in the domestic marketplace*. Finally, the views of the Executive Branch deserve respect in this case raising delicate matters of international relations.

ARGUMENT

I. The Holding of the D.C. Circuit Should Be Reversed Because it Ignores, and Undermines, Decades-Old Understandings of Antitrust Standing Rules

"In a complex case it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action." *Verizon Communications, Inc.* v. *Law Offices of Curtis v. Trinko*, No. 02-682, slip op. 1 (Jan. 13, 2004) (Stevens, J., concurring in the judgment). Consideration of this case can begin *and end* with that inquiry.

"Plainly, to recover damages respondents must prove *more* than that petitioner violated [the antitrust laws]." *Brunswick*, 429 U.S. at 486 (emphasis added). They must also show an injury that occurs "'by reason of' that which made the [conduct] unlawful." *Brunswick*, 429 U.S. at 488. Under either the D.C. Circuit's or the Second Circuit's construction of the FTAIA – indeed, any conceivable reading of 15 U.S.C. § 6a(1) – the conspiracy alleged here is unlawful only *by reason of* its U.S. effects. If effects were felt *only* in the Ukraine, Australia, Ecuador, and/or Panama, subsection (1) – and the preexisting antitrust standards it codifies – would indisputably preclude any

conclusion that *U.S.* antitrust law had been violated. Plaintiffs who allege injury arising from the effects of allegedly anticompetitive conduct on purely foreign transactions – effects irrelevant in deciding whether the underlying conduct is legal or illegal – do not have standing to recover for those injuries. "[F]oreign plaintiffs should not be able to extend the Sherman Act to markets and types of restraints which Congress has deliberately chosen not to cover." 2 WALLER, *supra*, § 13:23 (Supp. VI 2003).

There is no dispute that the FTAIA preserved the traditional notions of antitrust standing that were articulated in this Court's *Brunswick* holding. Nothing in the text of the FTAIA suggests any alteration of standing requirements, and the legislative history confirms that no alteration was intended: "[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." 1982 U.S.C.C.A.N. at 2496. Respondents concede the point (see Br. in Opp. 22 ("Clause 2 [of the FTAIA] imports the requirements of 'antitrust standing' that a plaintiff may recover only for 'injur[ies] of the type the antitrust laws were intended to prevent.'") (quoting *Brunswick*, 429 U.S. at 489)) and the D.C. Circuit purported to apply the *Brunswick* rule. Pet. App. 35a. But the court below in fact paid no more than lip service to this Court's *Brunswick* decision.

A. Clayton Act § 4, 15 U.S.C. § 15, permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages. This Court consistently has held that Section 4 confers standing only to recover damages for injuries that occur "'by reason of' *that which made the [conduct] unlawful.*" *Brunswick*, 429 U.S. at 488 (emphasis added). A causal relationship between the injury and the illegal conduct – allegations that plaintiffs "are in a worse position than they would have been had [defendants] not committed those acts" (*Brunswick*, 429 U.S. at 486) – is not enough to provide standing; such an expansive notion of causation would "divorce[] antitrust recovery from the purposes of the antitrust

laws." *Id.* at 487. See Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1135 (1976) ("[A]n antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding.").

This is so because a single course of conduct that violates the antitrust laws can have multiple *effects*, only some of which Congress sought to prevent when it enacted the antitrust laws. See *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 262 n.14 (1972) ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). In *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 540 & n.44 (1983), the fact that exclusionary conduct harmed businesses that employed union labor was not enough to confer standing on the plaintiff union. The union's harm was felt in a different market from the one in which commerce was illegally restrained.

A predatory conspiracy that injures a competitor may cause harm to others that have business relationships with the competitor, but such harm does not constitute antitrust injury. See *Trinko*, slip op. 1-2 (Stevens, J., concurring in the judgment); *G.K.A. Beverage Corp.* v. *Honickman*, 55 F.3d 762, 766 (2d Cir. 1995) (no allegation of antitrust injury when the antitrust harm occurred in the wholesale market, and the harm to plaintiffs occurred in the retail market); *Hairston* v. *Pacific-10 Conference*, 893 F. Supp. 1485, 1491 (W.D. Wash. 1994) (souvenir sellers did not allege antitrust injury when their revenues decreased because of sanctions imposed by the athletic conference on the University of Washington football program). A price-fixing conspiracy may raise prices and decrease output, but a terminated whistleblower-employee is not injured by reason of that restraint. *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739, 749-750 (9th Cir. 1984) (Kennedy, J., dissenting) ("Ostrofe was not a competitor or consumer in the market affected by the price-

fixing conspiracy, and in relation to that price-fixing, Ostrofe's injury was therefore indirect."). A tying arrangement that harms competition in one geographic market may actually help competition in another. See 2 JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 14.26, at 212 (2d ed. 1981). A price-fixing conspiracy may cause higher prices in a foreign market, subsidizing lower prices in the domestic market – but the harm felt in the foreign market does not provide a basis for suit in the United States. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.7 (1986).

Plaintiffs do not have standing to recover in these situations because their injuries are not "the type [of injury] that the statute was intended to forestall." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967). Antitrust standing turns on the "nature of the plaintiff's alleged injury" (*Associated General Contractors*, 459 U.S. at 538), not on the mere fact of an antitrust violation, the nature of that violation, or even injury in fact to the plaintiff. And a cognizable antitrust injury must be alleged even in the context of a *per se* antitrust violation. *Atlantic Richfield Co.* v. *USA Petrol. Co.*, 495 U.S. 328, 341-342 (1990) ("The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act.").

B. "That which made [petitioner's conduct] unlawful" in this case was, under any reasonable reading of the law, the conduct's effect on U.S. commerce, not its effects outside the United States. 2 WALLER, *supra*, § 13:23 ("Congress has stated that [the Sherman Act] was intended, first, to protect the competitive health of domestic markets * * * and, second * * * to protect export opportunities for American-based firms."). The FTAIA makes clear that the Sherman Act "does not apply" to conduct involving foreign commerce unless that conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic, import, or export commerce. Whether the conduct has *other*

effects – in particular, whether it restrains commerce that takes place solely within other countries (the effects that give rise to the injuries alleged by respondents in this case) – is completely irrelevant to the question whether the conduct is subject to the Sherman Act under the FTAIA. See *ibid.* ("[T]he Sherman Act prohibits some restraints and not others, and this conclusion should not change when a defendant is engaged in both classes of restraints. One is illegal under the Act. The other is not.").

Indeed, the requirement of a U.S. effect is the explicit premise of the D.C. Circuit's expansive notions of subject-matter jurisdiction under the FTAIA. In the D.C. Circuit's view, "the plaintiff *must* allege that some private person or entity has suffered actual or threatened injury *as a result of the U.S. effect* of the defendant's violation of the Sherman Act." Pet. App. 23a (emphasis added). But the D.C. Circuit erred by holding that U.S. effect "need not necessarily give rise to the particular plaintiff's private claim." Pet. App. 20a.

Antitrust standing principles reflect the teachings of the larger body of standing law, which operates to ensure that the proper party is suing.[3] 13 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3531, at 338-339 (2d ed. 1984). Prudential standing doctrine, such as the *Brunswick* rule,

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[3] This Court specifically has tied the antitrust standing requirement to the doctrine at common law. "[A]s was required in common law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated General Contractors*, 459 U.S. at 536. Judge Posner has commented: "There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris* v. *Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable." *Jack Walters & Sons Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 708-709 (7th Cir. 1984).

requires that the plaintiff be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970).[4] "What the plaintiff must show is 'a wrong' to herself; *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one." *Palsgraf* v. *Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.).

The zone of interests that the antitrust laws protect always has been limited to effects in the United States, even if the conduct producing those effects has occurred in whole or in part outside of the United States. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy."); *Matsushita*, 475 U.S. at 584 n.7 (plaintiffs failed to state a claim under the Sherman Act based on an alleged worldwide conspiracy where plaintiffs could not prove "that petitioners conspired to price predatorily in the American market"); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.) (*Alcoa*) ("We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."). The antitrust laws, in the words of Section 1 of the Sherman Act, 15 U.S.C. § 1, protect commerce "among the several States, or with foreign nations," not commerce within or among foreign nations.

In holding that respondents had standing to pursue their claims in this case, the D.C. Circuit fundamentally misconstrued the nature of the relevant antitrust standing inquiry. The D.C. Circuit's standing analysis focused on the legality of the challenged conduct, rather than the nature of the plaintiffs' injuries: "The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce." Pet. App. 35a. That statement simply does not address the relevant question. The proper standing inquiry "focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990) (citing cases); see, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit * * *."). The D.C. Circuit's conclusion that the defendant's *conduct* is forbidden sheds no light on whether *this plaintiff's injury* is the type of injury that Congress sought to prevent through enactment of the Sherman Act. Under any plausible reading, the FTAIA's requirement of effects in domestic commerce supports the clear rule that injuries arising from the U.S. effects of antitrust violations fall within the ambit of Congress's concerns, and that injuries arising from other effects – the kind of injuries alleged by respondents – do not.

C. The prudential considerations that underlie standing rules, both under the antitrust laws and in other contexts, have special force in the context of claims for injuries suffered by foreign buyers in transactions occurring in foreign countries. To begin with, such claims, under the constructions of the FTAIA adopted by the D.C. Circuit and the Second Circuit, are entirely dependent on the existence of some *other* claim that is based on U.S. effects. Even in a purely domestic context, such derivative standing is suspect.

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily. * * * Second, third

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[4] The Court in *Data Processing* interpreted Section 10 of the Administrative Procedure Act, which permits judicial review to be initiated by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" (5 U.S.C. § 702) – language very similar to Clayton Act § 4, 15 U.S.C. § 15 ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor").

parties themselves usually will be the best proponents of their own rights.

Singleton v. *Wulff*, 428 U.S. 106, 113-114 (1976).

In the present context this derivative standing is even more problematic. The trial court surely cannot assume the validity of a non-party's claim merely on the basis of the plaintiff's pleadings. To do so would eviscerate the requirement that the court have a factual basis for asserting jurisdiction. But, to find that the U.S. effects of the defendant's conduct give rise to a claim, the court would need to receive evidence and make a factual determination about the validity of the *other* claim. The D.C. Circuit "gave no explanation how the determination whether the domestic effect gives rise to a claim by 'someone' is to be made when that 'someone' is not before the court." *Delrahim Remarks* 6. If such a determination is even possible, evaluation of this second claim would undoubtedly threaten "the strong interest * * * in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated General Contractors*, 459 U.S. at 543. It would require, in essence, the adjudication of two cases, rather than one.

That strong interest in judicial manageability also will be jeopardized by the fact that the parties, witnesses, and documentary evidence with respect to the plaintiffs' claims will be located outside of the United States. Intractable discovery problems are likely, and even the simplest of issues may be complicated by the need to translate testimony and documents from a foreign language into English. Concerns such as unmanageable class action litigation and a tidal wave of litigation in the district courts also are implicated by the decision below. "[M]ost obviously, [*Kruman* and *Empagran*] will encourage more class action lawsuits in our already-crowded federal courts by *foreign* plaintiffs who claim antitrust injuries from conduct *outside* the United States." *Delrahim Remarks* 7. As this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a

meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Judge Friendly termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). And worldwide classes substantially magnify these concerns. Indeed, the size of potential liability is likely the primary reason the defendants in *Kruman* settled, rather than pursue their certiorari petition before this Court.

Prudential standing rules also reflect "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors*, 459 U.S. at 543-544. A standing doctrine that requires U.S. courts to award antitrust damages for conduct that directly and immediately affects victims in another country presents the concern of duplicate recovery, because foreign victims may seek damages in that other country, *in addition to* seeking damages through U.S. courts. Largely at the direct encouragement of the United States (see William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 362 (2000)), nearly 100 foreign jurisdictions have adopted their own antitrust enforcement regimes. *Delrahim Remarks* 2. This is true of three of the four nations where the effects alleged in this case occurred – the Ukraine, Panama, and Australia. See http://www.globalcompetitionreview.com/home/links.cfm (visited Jan. 23, 2004). Private damages actions have been filed overseas, including a class action in Australia. Pet. 5. It is possible that duplicate recoveries can be avoided through mechanisms similar to those U.S. courts would use to deal with the same problems – indeed, some foreign countries can be expected to go ever further in that direction and allow defendants to "claw back" two-thirds of what plaintiffs recovered in the United States (see p. 11, *supra*) – but figuring out *how* to avoid duplication is neither a small task (especially if the plaintiff recovered damages in the United States not as a named plaintiff but as a member of a certified class) nor one that U.S. courts can

expect foreign courts to handle in a uniform and consistent manner. Unmanageability and unpredictability are thus additional reasons why it is a bad idea to depart from the simple concept that those who may sue under U.S. antitrust law are those who suffer injury by reason of that which makes the defendants' conduct unlawful, which in this context is the domestic effects of the conduct.

D. Contrary to the apparent belief of the D.C. Circuit (Pet. App. 30a-32a), this Court's decision in *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), does not even remotely undermine the standing analysis above. *Pfizer* stands for the narrow proposition that foreign governments are "persons" entitled, by the plain language of Clayton Act § 4, to enforce the antitrust laws through private lawsuits in U.S. courts. 434 U.S. at 320; see *HeereMac*, 241 F.3d at 430 ("Indeed, *Pfizer*'s narrow holding was 'only that a foreign nation *otherwise entitled to sue in our courts* is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff.'") (quoting 434 U.S. at 320). *Pfizer* never has been interpreted to abrogate the *Brunswick* rule, adopted unanimously less than a year earlier, and the legislative history of the FTAIA contains approving references to each decision – demonstrating that Congress did not consider them to be in tension. See 1982 U.S.C.C.A.N. at 2495 (citing *Pfizer* for the proposition that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do"); *id.* at 2496 (citing *Brunswick* for the proposition that "the mere fact that an exporter may be adversely affected in a financial sense by the activities of another would not necessarily mean that he has sustained an injury for which he may recover under Section 4").

Pfizer's "deterrence" rationale also does not support a loosening of traditional standing rules. *Every* limitation on standing will reduce the number of potential claims against an antitrust wrongdoer, and in that limited sense could be said to undermine deterrence of antitrust violations, but that is hardly sufficient

reason to abandon those well-established rules. This Court was well aware of the importance of deterrence when deciding *Brunswick*. "Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed." 429 U.S. at 485. Nevertheless, "entirely fortuitous" recovery under Section 4 was not permitted (*id.* at 487) even though the possibility of such recovery might enhance deterrence. There is no reason to alter the balance between interests that this Court struck in *Brunswick*.

II. The FTAIA Limits the Subject-Matter Jurisdiction of U.S. Courts Applying U.S. Antitrust Laws, and Does Not Permit Suits by Foreign Plaintiffs Alleging Injury from Wholly Foreign Effects

A. Contrary to the views of respondents and the court below, the natural reading of Section 6a limits antitrust jurisdiction unless the plaintiffs allege injuries arising from effects in domestic commerce. At the threshold, the court below failed to recognize that undue extraterritorial application of a statute is disfavored. "It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian-American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

Of course, no dispute exists that the FTAIA expressly permits extraterritorial application of the Sherman Act in the sense of allowing antitrust actions against conduct undertaken overseas with U.S. effects. But, until *Kruman* and the decision below, no court had interpreted the Sherman Act, or the FTAIA,

to allow actions by foreign plaintiffs claiming injury felt wholly in foreign commerce.

Applying the *Aramco* presumption to the interpretation of the FTAIA, this Court should approach with great caution respondents' urging to read the Act to *broaden* the extraterritorial reach of the Sherman Act beyond what was accepted before its enactment. Respondents' argument in this case is especially suspect, because the argument is based on a strained reading of the statute that places enormous emphasis on the single word "a" and substitutes an inquiry into the situs of a defendant's *conduct* for the required inquiry into the location of the *effect*. See *HeereMac*, 241 F.3d at 427-428.

Respondents also face a substantial uphill battle to overcome Congress's manifest intent to *limit* the reach of the Sherman Act. The purpose of the *Aramco* rule – to "protect against unintended clashes between our laws and those of other nations which could result in international discord" (499 U.S. at 248) – is implicated in this case as well. As the Antitrust Division and the Federal Republic of Germany have already observed, the concern for diplomatic friction caused by the ruling below is substantial. See pp. 10-11, *supra*. "[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Alcoa*, 148 F.2d at 443.

B. Only through a "strict constructionist" reading could a court interpret the word "a" to reverse long-settled antitrust law principles. Such an absurd hyper-emphasis on the word "a" undermines any attempt to construe the FTAIA "reasonably, to contain all that it fairly means." ANTONIN SCALIA, A MATTER

OF INTERPRETATION 23 (1997).[5] Placing such reliance on the word "a" violates this Court's admonition (stated in a unanimous reversal of another D.C. Circuit decision) that "text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). In its interpretation of Section 6a, the D.C. Circuit again did just what this Court has disapproved. See also Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws*, 56 SMU L. REV. 2151, 2180 (2003) ("The plain meaning rule is a canon of statutory interpretation designed to assist courts in construing statutes; it is a tool, not a trump card.").

The court below reached its interpretation of Section 6a by blindly following a deterrence rationale, without considering seriously where blind pursuit of deterrence might lead. Initially, as the Solicitor General and the Antitrust Division have said, the holding below *undermines*, rather than supports, important antitrust enforcement goals. See p. 10, *supra*. Even if deterrence were a policy underlying the FTAIA, this Court disapproves such unbridled pursuit of a single statutory purpose. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) ("'[N]o legislation pursues its purposes at all costs * * * – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). Of course, interpreting the FTAIA (or any statute) by simplistically assuming that a policy that *does not* further the statute's primary intent is the law is utterly insupportable. No matter how virtuous the court

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[5] Such a reading would be the paradigm of "so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute." SCALIA, *supra*, at 23.

below believes the policy may be, a deterrence rationale that Congress did not discuss may not trump all appropriate interpretations of the statutory text and the legislative history.

This Court has refused to be led by the goal of deterrence into expanding the reach of the antitrust laws to apply to conduct that Congress did not intend them to cover. See *Trinko*, slip op. 12. The Court noted especially that the presence of alternate schemes that "perform[] the antitrust function" militates against "recognizing an expansion of the contours" of the antitrust laws. *Ibid.* The alternate schemes present in this case are the scores of foreign antitrust laws "designed to deter and remedy anticompetitive harm" (*ibid.*) – in spite of which the court below somehow felt that deterrence was inadequate. As the Antitrust Division has articulated, "European Union, Canadian, and Australian authorities similarly have obtained record fines against the vitamin companies." Pet. App. 68a.

A holistic approach (see *United Savs. Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)) to understanding the text of Section 6a, by contrast, produces a defensible interpretation of the FTAIA. The Act makes clear that only claims based on injury caused by the "direct, substantial, and reasonably foreseeable effect[s]" on U.S. commerce of a Sherman Act violation would come within the subject-matter jurisdiction of U.S. courts.

Congress did so by requiring that, to bring any suit under the antitrust laws alleging "conduct involving trade or commerce * * * with foreign nations," the plaintiff must plead and prove two elements. The first element is "a direct, substantial, and reasonably foreseeable effect" on domestic or export commerce. 15 U.S.C. § 6a(1). The second element is that "such effect gives rise to a claim" under the Sherman Act. *Id.* § 6(a)(2). Under the D.C. Circuit's interpretation of Section 6a, this second element arguably is redundant. Virtually by definition, *any* agreement in restraint of trade that has "a direct, substantial and reasonably foreseeable effect" on domestic commerce will give rise to an antitrust claim by *someone*. This

Court should not countenance a reading of the FTAIA that writes Section 6a(2) out of the statute. See *Alaska Dep't of Env'tl Conservation* v. *EPA*, No. 02-658, slip op. 23 n.13 (Jan. 21, 2004) ("[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Instead, interpreting Section 6a "reasonably, to contain all that it fairly means," the Court should consider the "gives rise to a claim" language to be Congress's effort to make clear that the claim of *the plaintiff invoking the subject-matter jurisdiction* of the federal court must be predicated on a direct, substantial and reasonably foreseeable effect on U.S. commerce. "The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in [*HeereMac*], under which the phrase 'gives rise to a claim' refers to the claim advanced by the plaintiff in the action before the court." Pet. App. 40a (Henderson, J., dissenting).[6]

Respondents suggest (Br. in Opp. 22) that Congress inserted the language in Section 6a(2) simply to reaffirm the *Brunswick* doctrine. Even if respondents' argument were cor-

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[6] See also Cavanagh, *supra*, at 2182 ("The most logical reading of § 6a(1) and § 6a(2) is that § 6a(1) requires that anticompetitive effects be 'direct, substantial and reasonably foreseeable;' and § 6a(2) requires that anticompetitive acts that create a basis for subject matter jurisdiction be the same acts which gave rise to the claim asserted.").

rect, the argument would lead to reversal. As discussed above (pp. 13-23, *supra*), the *Brunswick* antitrust standing rule *itself* contradicts the decision below. But respondents' interpretation of Section 6a(2) is not correct in any event. Not a word in either clause of the statute refers to (or even echoes) the *Brunswick* doctrine. If Congress had wished by this language to reaffirm *Brunswick*, presumably it would have referred specifically to *anticompetitive* effects, as distinct from *neutral*, or *procompetitive*, effects. It would have been entirely unnecessary for Congress to reaffirm *Brunswick* in any event, because *Brunswick* is clearly grounded in the text of Clayton Act § 4 (429 U.S. at 488), and nothing about the FTAIA disturbs Section 4. Finally, Congress would have no reason to "import the requirement of 'antitrust standing'" (Br. in Opp. 22) into the FTAIA, but not into other aspects of the antitrust laws. Rather than taking the needless step of dealing with *Brunswick* in the FTAIA, Congress clarified its intent on this subject in the legislative history and left untouched the language of Section 4.

C. The legislative history also "unambiguously support[s]" (Pet. App. 40a (Henderson, J., dissenting)) the conclusion that "gives rise to a claim" in Section 6a(2) refers not to just *any* claim, but to *the* claim advanced by *that* plaintiff. This was the result reached by the Fifth Circuit in *HeereMac*, by the district court below, and by Judge Henderson in dissent – as well as by several other district courts (see Pet. App. 50a (citing cases))[7] – after their own careful analyses of the legislative history.

The House Report states clearly that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." 1982 U.S.C.C.A.N. at 2496-2497. The court below justified its contrary holding by quoting other language in the legislative history:

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[7] See also *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 706 (E.D. Pa. 2001); *The 'In' Porters*, 663 F. Supp. at 598-600; *Liamuiga Tours*, 617 F. Supp. at 923-924; *Eurim-Pharm*, 593 F. Supp. at 1107.

> "The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States – *e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf.*, *e.g.*, [*Pfizer*, 434 U.S. 308]. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do."

Pet. App. 29a (quoting 1982 U.S.C.C.A.N. at 2495). But the quoted passage only makes clear that the *place* where the injury is suffered, and the nationality of the injured party, does not prevent a private claim based on effects "in the *domestic marketplace*." See Pet. App. 41a (Henderson, J., dissenting). In fact, the last sentence quoted above might be thought dispositive of respondents' argument. The plaintiffs in this case do not even claim to seek "protection * * * in the domestic marketplace." Rather, they seek the protection of U.S. antitrust laws in various foreign marketplaces – in the Ukraine, Panama, Ecuador, and Australia. *No authority – anywhere* – supports granting the plaintiffs that right. See *In re Microsoft Corp.* 127 F. Supp. 2d at 716 ("Nothing is said about protecting foreign purchasers in foreign markets.").

This unequivocal language in the legislative history supports the natural, plain meaning of the text of Section 6a. No basis exists to interpret the legislative history as the majority did below, to grant jurisdiction and standing where none previously existed.

D. It is significant that the Executive Branch agrees with this interpretation of the FTAIA. The issues in this case raise delicate matters of international relations, and in such matters

the Court has always paid special heed to the views of the Executive Branch. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 385-386 (2000) ("Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement.") (citation omitted). Indeed, in *Hartford Fire*, 509 U.S. 764, this Court resolved an issue of international comity in antitrust in accordance with the *amicus* views of the United States (which supported the plaintiffs). In *Pfizer*, 434 U.S. at 319 & n.20, the Court took pains to note that "the result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy" and supported that statement by observing in a footnote that the State Department had advised that it did not "anticipate any foreign policy problems" from a resolution of that case in favor of the plaintiffs.

Here, in marked contrast, the government has stated that a statute designed to protect American businesses *and* decrease international friction *was* interpreted incorrectly by the D.C. Circuit, presenting possible problems for U.S. international relations. Because the statute being construed inherently touches on sensitive matters of foreign relations, the Court should give great weight to the views of the Executive Branch. In any event, for all the reasons given in this brief and in the petitioners' and other supporting *amici*'s briefs, there is more than sufficient reason, on any of several different grounds, to reverse the decision below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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F. HOFFMANN-LA ROCHE LTD, ET AL.,
Petitioners,

v.

EMPAGRAN, S.A., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY AND BELGIUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. CONTRARY TO WELL-SETTLED PRINCIPLES OF LAW, THE COURT OF APPEALS' DECISION FAILED TO CONSIDER THE SUBSTANTIAL INTERESTS OTHER NATIONS HAVE IN THE REGULATION OF THEIR OWN INDUSTRIES AND COMMERCE 6

A. United States And International Laws Require Respect For The Jurisdiction Of Other States 6

B. General Principles Of Comity And Respect For Foreign Sovereignty Interests Also Apply To United States Antitrust Enforcement And Jurisdiction Under The "Effects" Test 8

C. The Court Of Appeals Failed To Respect The Legitimate Choices Other Nations Have Made That Reject Certain Aspects Of The United States' Antitrust Laws 10

II. FOREIGN VIOLATIONS OF ANTITRUST PRINCIPLES ARE SUFFICIENTLY REGULATED, INVESTIGATED, AND PUNISHED BY OTHER COUNTRIES' COMPETITION LAWS SO THAT APPLICATION OF UNITED STATES LAW TO EXTRATERRITORIAL EFFECTS IS UNNECESSARY TO PREVENT GLOBAL CONSPIRACIES 16

III. IN EXPLAINING THE EXTRATERRITORIAL REACH OF THE FTAIA, CONGRESS OBSERVED SIMILAR CONCERNS ABOUT COMITY AND THE INTERESTS AND ENFORCEMENT EFFORTS OF FOREIGN NATIONS..... 20

A. Congress Relied On The Existence Of Effective Antitrust Enforcement As A Reason To Enact The FTAIA To Limit Extraterritorial Application Of U.S. Antitrust Law 20

B. Congress Was Sensitive To The Diplomatic And Political Ramifications Of Expansive U.S. Antitrust Jurisdiction..... 22

IV. EXPANSIVE EXTRATERRITORIAL APPLICATION OF UNITED STATES JURISDICTION THREATENS TO UNDERMINE INTERNATIONAL COOPERATION AND GLOBAL ANTITRUST ENFORCEMENT 24

A. Foreign Concerns About U.S. Exercises Of Extraterritorial Jurisdiction Have Produced A Variety Of Counter-Reactions..... 25

B. The Decision Below Impinges On Governmental Leniency Policies 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

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INTEREST OF *AMICI CURIAE*[1]

The Federal Republic of Germany has one of the world's most advanced and extensive legal regimes to protect against economic competition abuses. Under its Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or *GWB*),[2] Germany prohibits "[a]greements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition." GWB § 1. That law "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Germany's enforcement efforts and merger review procedures have been evaluated as being "at the top of the European rankings" and "second overall behind the US." *Rating Enforcement Survey*, Global Competition Review, June 2003, at 22. Since the beginning of 2003, the Federal Cartel Office (*Bundeskartellamt*) has levied more than €700 million in fines against companies and executives involved in cartels, conducted 7 significant raids of 199 companies and homes, and reviewed some 1,300 mergers. *See Bundeskartellamt Report, available at* http://www.bundeskartellamt.de/17_12_2003englisch.html. Such efforts have been recognized by the Organisation for Economic Co-operation and Development ("OECD") as sending a clear message about the importance of competition while permitting efficient cooperation.

As a Member State in the European Union ("EU"), Germany also provides political, economic, and enforcement

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that they authored this brief and that no entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief, and letters reflecting their consent have been filed with the Clerk.

[2] Both the original German version and the English translation of the GWB are available at http://www.bundeskartellamt.de/competition_act.html.

support for the EU's competition laws, which, in conjunction with Member States' national competition laws, operate as a dual enforcement system in Europe. Like Germany, the EU vigorously pursues cartels, levying €1.839 billion in fines during 2001 and €950 million during 2002. *See The Fight Against Cartels: Statistics, available at* http://europa.eu.int/comm/competition/citizen/cartel _stats.html.

Petitioners in this case include German companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales. *See* Pet. 5. Germany participated in EU enforcement efforts that produced €855 million (approximately US$1 billion) in fines against companies that are petitioners in this case. Germany has significant economic and political interests in ensuring that companies acting within German markets comply with German and EU competition laws, and in protecting against the encroachment of other countries' laws on those enforcement efforts. Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs – whose injuries were sustained in transactions entirely outside United States commerce – seeking treble damages in private lawsuits against German companies. Accordingly, Germany has a substantial interest in the proper construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA" or "Act"), 15 U.S.C. § 6a.

Belgium also is a Member State in the EU, is a member of the OECD, and supports the enforcement efforts of the European Commission ("EC") and the EU's competition laws. Belgium likewise has its own competition enforcement regime. Its Act on the Protection of Economic Competition ("Belgian Act")[3] prohibits "agreements between undertakings . . . and concerted practices whose object or

[3] The English translation of the Belgian Act is available at http://www.mineco.fgov.be/homepull_en.htm.

effect is to significantly prevent, restrain or distort competition in the Belgian market concerned or in a substantial part of it." Belgian Act Art. 2, § 1. The Belgian Act also prohibits "[a]ny abuse of a dominant position in the Belgian market concerned or in a substantial part of it by one or more undertakings." *Id.*, Art. 3. And the Act provides for EU enforcement where unlawful restraints on trade fall within the jurisdiction of the EC. *Id.*, Art. 13.

Belgium has a substantial interest in ensuring that companies acting within Belgium and the EU comply with Belgian and EU competition laws, and ensuring that U.S. antitrust laws and the availability of civil damages actions in U.S. courts do not interfere with Belgian and EU enforcement efforts. Belgium therefore has a substantial interest in the proper construction of the FTAIA.

STATEMENT

Petitioners are foreign and domestic manufacturers and distributors of vitamins. Respondents are foreign corporations domiciled in foreign countries that purchased vitamins from petitioners in foreign markets. Respondents' class action alleges that petitioners conspired to fix prices and allocate market share in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. §§ 15 and 26.

The district court dismissed respondents' federal antitrust claims for lack of subject-matter jurisdiction. Pet. App. 46a. The court noted that the "critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at 48a. That question required the court to consider a provision of the FTAIA, 15 U.S.C. § 6a, which provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce," and "such effect gives rise to a claim under

the provisions of sections 1 to 7 of this title." Pet. App. 48a (quoting 15 U.S.C. § 6a). The district court concluded that, because respondents had purchased vitamins solely in foreign markets, they had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case." *Id.* at 49a.

Respondents appealed. They contended that the FTAIA does not restrict jurisdiction to the same claim on which the jurisdictional effects are based. The court of appeals agreed and reversed, holding that, "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Id.* at 4a. The court opined that it is sufficient for jurisdiction if the conduct "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* In so ruling, the court relied on a "literal reading of the statute," as well as the FTAIA's legislative history and "underlying policies of deterrence" that it gleaned from *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). Pet. App. 4a.

SUMMARY OF ARGUMENT

The court of appeals' decision incorrectly interprets the FTAIA in a manner that will do grave harm to the antitrust enforcement efforts of the international community. The court's interpretation drastically expands the extraterritorial reach of the United States' antitrust laws to situations in which the conduct and the alleged anticompetitive effects suffered by foreign plaintiffs occur only in foreign countries. Yet, in those situations, other nations have a significant interest in the transaction and its effects and have jurisdiction to regulate or prohibit that conduct. The court's holding thus directly conflicts with the well-established principle that United States statutes are to be construed to avoid conflict with other nations' laws and to avoid unreasonableness in the exercise of U.S. courts' jurisdiction. *See Restatement (Third) of Foreign Relations Law of the United States* § 403 cmt. g, at 248 (1987) ("*Restatement (Third)*").

The court of appeals' expansive interpretation of the United States' antitrust laws will permit foreign civil litigants to use United States lawsuits to circumvent the choices made by foreign governments about the most appropriate remedies available for anticompetitive behavior. The court's interpretation of the FTAIA also threatens to undermine international antitrust cooperation and enforcement, contrary to the "underlying policies of deterrence" upon which the court relied. For example, foreign governments use leniency programs similar to the one utilized by the Department of Justice ("DOJ") to obtain information about violations; they then use that information to deter other abuses. Yet private suits, such as respondents', create strong disincentives for companies to participate in such programs because to do so increases the risk that the information they disclose to governments will subject them to private civil liability and treble damages.

The court of appeals failed to consider any of these factors. It failed to consider the well-settled principles of comity and respect for the sovereign choices of foreign nations that counsel in favor of a limited application of U.S. antitrust laws to extraterritorial effects. It failed to consider the negative impact that an expansive application of U.S. antitrust law could have on domestic and international cooperation and enforcement, including prompting retaliatory legislation in other countries. And it failed to consider the legislative history of the FTAIA, where Congress recognized all of these concerns as motivating the passage of this legislation. Accordingly, the court improperly interpreted Section 6a of the FTAIA to extend U.S. antitrust jurisdiction to the foreign conduct at issue. The court's decision should be reversed.

ARGUMENT

I. CONTRARY TO WELL-SETTLED PRINCIPLES OF LAW, THE COURT OF APPEALS' DECISION FAILED TO CONSIDER THE SUBSTANTIAL INTERESTS OTHER NATIONS HAVE IN THE REGULATION OF THEIR OWN INDUSTRIES AND COMMERCE

A. United States And International Laws Require Respect For The Jurisdiction Of Other States

Amici agree with petitioners that federal court subject-matter jurisdiction does not exist in this case under the "effects" test, the FTAIA, or any other doctrine, because the particular conduct and purchases of vitamins at issue here occurred solely in foreign commerce. Even if jurisdiction could be found under existing effects doctrine, however, principles of both United States and international law require that nations consider the sovereign interests of other countries before exercising their jurisdiction extraterritorially. The court of appeals did not address these principles, let alone accord proper deference to the interests of those nations most directly affected by the conduct and transactions that are alleged to have caused these foreign respondents' injuries.

The court of appeals' conclusion that jurisdiction exists in this case is contrary to United States law, which recognizes that, "[w]here regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place." *Restatement (Third)* § 403 reporter's note, at 250. This principle informs the proper method of construing statutes such as the FTAIA. *See id.* cmt. a, at 245 ("courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable"); *id.* cmt. g, at 248 ("if one construction of a United States statute would bring it

in conflict with the law of another state that has a clearly greater interest, . . . while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible").

The principle of judicial restraint and reasonableness is well recognized under U.S. law. The *Restatement (Third)* observes that, "[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* § 403(1), at 244. Among the factors bearing upon the reasonableness of exercising jurisdiction are "the extent to which other states regulate such activities," § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," § 403(2)(g); and "the likelihood of conflict with regulation by another state," § 403(2)(h). As is demonstrated below, the exercise of U.S. jurisdiction over transactions and injuries that occurred solely in foreign commerce would be an unreasonable interpretation and application of the FTAIA.

International law similarly requires respect for other nations' interests. For example, the OECD urges its members to "take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries," and calls for "cooperation as an alternative to unilateral action." OECD, Committee on Int'l Investment and Multinat'l Enters., *The 1984 Review of 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises*, approved May 18, 1984, OECD Doc. Press/A(84). More recently, the OECD has recommended that its members recognize "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices." *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, approved July 27, 1995, OECD Doc. No. C(95)130/Final.

B. General Principles Of Comity And Respect For Foreign Sovereignty Interests Also Apply To United States Antitrust Enforcement And Jurisdiction Under The "Effects" Test

These general principles of jurisdictional law apply to antitrust regulation.[4] Other nations share common ground with the United States in applying the effects doctrine, which has been accepted in "most of the world." Eleanor M. Fox, *International Antitrust and the DOHA Dome*, 43 Va. J. Int'l L. 911, 916 (2003). *See also Restatement (Third)* § 403 reporter's note, at 250 (observing that "[m]ost other states of Western Europe . . . have accepted the effects doctrine as applied to economic effects, either in their legislation or in political decisions"). Germany's competition law, for example, provides that it "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Indeed, "Germany appears to have been foremost among the member states of the [European Community] to embrace extraterritoriality." Dorsey D. Ellis, *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 Wash. U. Global Stud. L. Rev. 477, 501 (2002). The EU, too, has adopted the effects doctrine, as "both the Commission and the Court of Justice of the European Community have applied Community law to enterprises not engaged in business in the Community, on the basis of the effect of

[4] For instance, the OECD has stated that its members "should co-operate with each other in enforcing their laws against [hard core] cartels" and "should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests." *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, approved March 25, 1998, OECD Doc. No. C(98)35/FINAL. Consistent with these comity principles, "a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests." *Id.*

restrictive practices within the Community." *Restatement (Third)* § 415 reporter's note, at 294. *See also Gencor Ltd. v. Commission* (Case T-102/96, 25.3.1999, E.C.R. 1999, Page II-00753) (EC's regulation of competition "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community").

In applying the effects test, United States courts properly have exercised discretion when an expansive application of U.S. law would intrude on the interests of foreign sovereigns that also are seeking to enforce their own competition laws against the very same companies. *See* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272d, at 353 (2d ed. 2000). Thus, even where foreign conduct has been determined to have some effect on American commerce, that does not compel the conclusion that United States jurisdiction is proper – "the court may wish for reasons of prudence, policy, comity, or economy not to proceed further." *Id.* ¶ 273c, at 374. As Judge Learned Hand explained the inquiry under the "effects" test, United States jurisdiction should be invoked with "regard to the limitations customarily observed by nations upon the exercise of their powers." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). *See also Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (construing Jones Act "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law").

Consideration of other nations' interests counsels against an exercise of U.S. jurisdiction in this case. The most important factors – primacy over a given transaction, the locus of the conduct, the locus of that conduct's effects, and the strength of the foreign state's policies that bear on the problem – all point to countries *other than* the United States as the proper forum for these disputes. *See* IA Areeda & Hovenkamp, *supra*, ¶ 276, at 413. The foreign respondents' purchases of vitamins in foreign commerce do not give the U.S. primacy over those transactions.

Countries such as Germany are in general accord with United States law in limiting enforcement of competition laws only to those foreign actions that have effects in Germany. Conversely, rulings by United States courts that expand the effects doctrine and thereby apply the United States' antitrust laws to foreign nationals and foreign conduct have rightly been criticized "on grounds of foreign relations, international law or comity, often by the U.S.'s closest allies." Mark R. Joelson, *An International Antitrust Primer* 54 (2d ed. 2001). *See also* I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.16, at 126-27 & n.2 (5th ed. 1996) (cataloguing cases where foreign governments have protested and disputed "the jurisdiction of United States courts over their nationals or over the activities of their nationals outside of the territorial boundaries of the United States"); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 159 (1999) ("aggressive unilateral enforcement continues to provoke conflicts among close trading partners and to create uncertainty for transnational firms").

C. The Court Of Appeals Failed To Respect The Legitimate Choices Other Nations Have Made That Reject Certain Aspects Of The United States' Antitrust Laws

The court of appeals' application of the United States' antitrust laws to foreign plaintiffs that purchased vitamins exclusively in foreign commerce interferes with the sovereign interests of other nations. The court failed to give proper consideration to the legitimate choices those nations have made concerning the regulation of their own commerce and competition in their own markets. It failed to recognize, too, that there often are "important differences between domestic and international markets in . . . the environmental circumstances bearing upon the 'reasonableness' of a given restraint" on trade. IA Areeda & Hovenkamp, *supra*, ¶ 273, at 372.[5]

Some of those differences between the United States' and other nations' legal systems are well known. Like many other countries, for example, neither Germany nor Belgium provides for trebling of private antitrust damages awards. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. Int'l L. 219, 251 (2001) (treble damages are "one of the most unacceptable aspects of U.S. regulatory law"); *see also* Pet. 23.

Other controversial features of the U.S. legal system include extensive discovery, jury trials, class actions, contingent fees, and punitive damages. *See* Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523, 532 (2002); Joelson, *supra*, at 6 ("treble damage awards, contingency fees, and class action procedures . . . have little support elsewhere"). Furthermore, the "Court of Justice has emphasized that [EU competition law] is not the same as the Sherman Act in that there are no per se violations" under EU law. Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519.

In addition to the foregoing characteristics that differentiate the U.S. legal system from those of other countries, Germany, Belgium, and the EU approach competition law in certain respects in a manner different from the United States. Compared to the United States, for example, the German system sets a different balance between the civil and administrative punishment of violations of competition law. While in Germany private parties can also claim

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[5] "If the U.S. courts permit forum-shopping by foreign entities where the dispute has little causal connection with the U.S., then that can only operate to the detriment of other antitrust enforcement systems which may take a different view on matters such as treble damages and contingency fees." Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 Loy. Consumer L. Rev. 509, 512 (2002).

damages, *see* GWB § 33, Germany's focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities. *See* Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, *available at* http://www.antitrust.de/kartellrecht.htm.

Moreover, apart from the prohibition on hard-core cartels, which are prohibited almost universally, there is less certainty in how competition policy should treat grey areas of cooperation between competitors. *See* II Fugate, *supra*, § 16.9, at 566 (noting that Germany exempts "particular types of cartels such as rationalization cartels organized to take advantage of technical improvements in an industry."). Germany exempts certain agreements that "contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods, while allowing consumers a fair share of the resulting benefit." Joachim Rudo, *The 1999 Amendments to the German Act Against Restraints of Competition*, *available at* http://www.antitrust.de/gwb-amendment.htm.[6]

[6] The German law follows the EU model, which provides a similar exemption for an agreement that "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, Art. 81(3), O.J. (C 325) 33, 64-65 (2002) (formerly Article 85 of the Treaty of Rome), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf. About this exemption it has been remarked that, "[w]hen compared to the Department of Justice, the Commission clearly has a much broader administrative role in antitrust matters (for example through the granting of exemptions under Article 81(3))." Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519. Effective May 1, 2004, Germany also will change its laws concerning exemptions for agreements with transnational effects to provide that such agreements will in the future be assessed under Article 81. *See* Draft Parameters for the 7th Amendment to the Act Against Restraints of Competition, *available at* http://www.bmwa.bund.de (German version only).

In Belgium, although private claims for damages are available in civil courts, the Belgian competition regime primarily utilizes a number of administrative and enforcement bodies to investigate and prosecute violations of the Belgian Act, including: the Competition Service, a unit of the Federal Public Service Economy responsible for detecting and noting the existence of restrictive practices and carrying out investigations of those; the Corps of Rapporteurs, which organizes investigations and the agents performing them and issues the investigation report; and the Competition Council, an administrative court comprised of judicial magistrates and experts in competition with the authority to make decisions and advance proposals and opinions. And, like Germany and the EU, the Belgian Act permits exemption of agreements "which contribute to improving production or distribution or to promoting technical or economic progress or which allow small and medium-sized undertakings to strengthen their competitive position in the market concerned or in the international market," so long as those agreements "provid[e] users with a fair share of the profit resulting therefrom" and do not "eliminate competition for a substantial part of the products concerned." Belgian Act Art. 2, § 3.

The United States' antitrust laws do not necessarily recognize similar exemptions from criminal prosecution under the Sherman Act, let alone from suits by private plaintiffs who allege that they were injured by the foreign anticompetitive effects of such cartels. By applying the United States' antitrust laws in cases where neither the plaintiff nor the alleged harm has direct effects on United States commerce, the court of appeals' decision fails to respect the fundamental right of foreign sovereigns to regulate their own markets and industries.

That is not to say that German, Belgian, or EU enforcement is any less vigorous than American efforts. In some ways, these competition laws are stricter than

United States law;[7] in other ways, less strict. Hard-core cartels like the one charged in the vitamin cases are illegal and subject to vigorous prosecution in both countries and in the EU, where substantial penalties already have been assessed against companies that include petitioners. And, in most cases, the results of enforcement efforts in the United States, on the one hand, and in Germany, Belgium, and the EU, on the other, are similar.

However, the theory and application of the competition laws of Belgium, Germany, the EU, and the U.S. differ in important ways. For example, in the U.S., agency practice and courts decide whether certain agreements restraining competition are illegal by applying a "rule of reason" analysis. By contrast, German law provides for a very broad-reaching prohibition of agreements between competitors (GWB § 1), with enumerated exceptions (GWB §§ 2-8). So, too, for the Belgian regime, which prohibits cartels under the Belgian Act, Article 2, § 1, and then provides for exemptions under Article 2, § 3.

Sometimes those varying approaches may result in different decisions as to the method of enforcement or whether a prohibition is appropriate at all. And, irrespective of whether a different outcome may result under the various systems, U.S. law should not trump Germany's and Belgium's sovereign rights to make their own choices about how to structure and apply their competition laws in determining liability and imposing remedies.

For this reason, permitting suits such as respondents' encroaches directly on contrary sovereign choices made by other countries. German, Belgian, and European laws treat the vitamin case as a hard-core cartel that cannot be subject to an individual exemption. Germany, Belgium, and other EU Member States should be given the freedom

[7] *See, e.g.*, Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519 (noting that the EU's "Article 81 is of wider ambit than Section 1 of the Sherman Act and can catch conduct, which involves a lesser degree of culpability than its U.S. counterpart").

to impose different remedies than those that would be imposed under the U.S. system. And the EC has, in fact, already imposed considerable fines on account of the vitamin cartel's effects in Germany and other EU Member States.

Other branches of the U.S. government have expressed sensitivity to those concerns. The U.S. Deputy Assistant Attorney General for Antitrust has recognized that "the United States is not alone in today's antitrust world; we are joined by nearly 100 other jurisdictions, many of them with effective court systems, and as they have considered their system of enforcement, some have found it fit, as a matter of domestic policy, to provide for certain private rights of action and some have not." Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Speech Before the American Bar Association Section of Antitrust Law, Washington, D.C. (Nov. 18, 2003), at 7, *available at* http://www.usdoj.gov/atr/public/speeches/201509.htm. The court of appeals' decision effectively trumps this sensitivity and the balance in the Executive Branch's approach by expanding U.S. jurisdiction without consideration of other countries' interests.

Indeed, it is especially intrusive on other nations' interests that the court of appeals' decision opens the door to private foreign plaintiffs who seek treble damages, as opposed to opening the door simply for DOJ enforcement. Private plaintiffs rarely exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments that mark actions brought by the United States government. *See* Griffin, *supra*, 67 Antitrust L.J. at 194. *See also* International Competition Policy Advisory Committee, *Final Report* 246 (2000) (observing that, "while the U.S. Department of Justice considers principles of comity before considering whether to bring an enforcement action, private parties are not bound by such strictures"), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm; Buxbaum, *supra*, 26 Yale J. Int'l L. at 253 (noting the concern that "private suits may be initiated in

situations in which the government had in fact considered enforcement, but after analyzing the competing interests involved had declined to act"); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (consideration of the international implications of the exercise of U.S. jurisdiction "is especially required in private suits . . . for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been out-weighed").

II. FOREIGN VIOLATIONS OF ANTITRUST PRINCIPLES ARE SUFFICIENTLY REGULATED, INVESTIGATED, AND PUNISHED BY OTHER COUNTRIES' COMPETITION LAWS SO THAT APPLICATION OF UNITED STATES LAW TO EXTRATERRITORIAL EFFECTS IS UNNECESSARY TO PREVENT GLOBAL CONSPIRACIES

In analyzing deterrence issues, the court of appeals failed to consider the existence of effective competition enforcement regimes in other countries. The court justified its decision on the ground that "[d]isallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce." Pet. App. 32a. We respectfully submit that the court is gravely mistaken. Not only will the court's decision likely produce *less* effective deterrence of global conspiracies by hindering international cooperation, *see* Part IV, *infra*, but it also fails properly to recognize that other nations already have in place effective competition regulations and laws that adequately prohibit and deter global conspiracies affecting those nations' own commerce.[8]

[8] In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003), the Second Circuit relied on a similarly mistaken policy justification for extending U.S. antitrust jurisdiction, opining that, if "plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone." *Id.* at 403. Like the court of appeals here, the *Kruman* court failed to consider that the plaintiffs affected by the foreign scheme would have sufficient remedies in the countries where the conduct occurred and where the injuries were sustained.

The near-universal acceptance of an effects test, as described above, means that rarely, if ever, will a global conspiracy go unregulated and unpunished under other countries' competition laws. Similarly, the existence of such laws reflects the seriousness with which other nations take their responsibility to police activities that form the basis for an alleged worldwide conspiracy. This fact has been recognized on both sides of the Atlantic. The DOJ has attributed the increase in the number of international cartel cases to the efforts of the Antitrust Division and "other antitrust agencies in recent years." Delrahim, *supra*, at 9 (citation omitted).

Many of those cases are investigated by utilizing "positive comity" agreements, pursuant to which "the affected authority may request that the other initiate enforcement activities." Griffin, *supra*, 67 Antitrust L.J. at 183. Because it relies on diplomacy and not unilateral expansion of one nation's laws, "[p]ositive comity is intended to eliminate the long-running dispute concerning the propriety under international law of assertions of extraterritorial jurisdiction." *Id.* The United States and the EU have had a formal positive comity agreement in place since 1991, and in 1998 the two parties built upon that agreement with the Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, *reprinted at* 37 I.L.M. 1070 (1998). The Agreement states that among its purposes is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating

enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory." *Id.* at 1071. In the years since the 1991 Agreement was signed, "[e]nforcement officials on both sides of the Atlantic have confirmed that the flow of information between them has increased significantly." Griffin, *supra*, 67 Antitrust L.J. at 181 (noting, for example, that, in 1997 alone, "the U.S. antitrust agencies sent thirty-six notifications to Brussels and received forty-two from the Commission").[9]

The efficacy of those joint governmental efforts is evident in the investigation and punishment of the very vitamin cartel involved in this case. As petitioners noted in seeking a writ of certiorari, substantial penalties already have been assessed against the vitamin companies by countries outside of the United States, and there are pending private civil suits and class actions in a number of other countries. *See* Pet. 5; *see also* p.2, *supra*. In Belgium, a suit was brought against petitioner UCB S.A. and has since been settled. Such efforts are only part of a larger trend. Today, more than 100 countries have competition laws, marking a significant increase in the regulation of global antitrust issues. *See* H. Stephen Harris, *Competition Laws Outside the United States*, 2001 A.B.A. Sec. Antitrust L. 13. Germany's Federal Cartel Office alone investigated some 164 cartel or price-fixing cases in 2001

[9] Even in cases where a foreign nation rejects the United States' request for that government to intervene or prevent certain conduct, commentators have expressed the view that "we doubt the wisdom of using the United States antitrust laws to restructure a foreign country's domestic industry apart from extraordinary circumstances." IA Areeda & Hovenkamp, *supra*, ¶ 272g, at 356. Moreover, other commentators have noted that the expansive application of one nation's law may actually result in "systematic overregulation" and deterrence of even beneficial activities. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 908 (2002) (noting that, where a government regulates all conduct in which it has any interest, "[a]n activity that harms one country will be prevented even if that harm is outweighed by the benefits enjoyed by other countries" and that this approach "prevents many welfare-increasing activities").

and 204 cases in 2002 – and those figures do not even include the numerous investigations the States of the German Federation conducted in those years. *See* Federal Cartel Office, *Biennial Activity Report 2001/2002*, at 274 (June 27, 2003) ("June 2003 Federal Cartel Report"), *available at* http://dip.bundestag.de/btd/15/012/1501226.pdf (German version only); *see also* II Fugate, *supra*, § 16.9, at 566 (commenting that "[t]he German Cartel Authority, with a large staff, vigorously enforces the statute"). Moreover, in 1999, the European Commission carried out investigations in 226 cases arising either from customer or competitor complaints, or from investigations raised on its own initiative. *See* European Comm'n, *Competition Policy in Europe and the Citizen* 13 (2000), *available at* http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/en.pdf.

Those efforts have produced a significant level of deterrence of competition law abuses. Subjecting companies to treble damages actions is unnecessary to achieve the desired deterrence and will, in fact, be counterproductive to ongoing enforcement efforts. *See* Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53, 54 (Sum. 2001) ("in view of the spectacular growth of antitrust in Europe and elsewhere, international cartels are sufficiently deterred without the need to extend U.S. treble damage protection to all victims around the world"). *See also* Lambert, *supra*, 14 Loy. Consumer L. Rev. at 512 ("A private litigation-based system is not the only plausible system of ensuring compliance with the goals of the antitrust laws."). The court of appeals, however, adopted the mistaken view that international cartels can be sufficiently deterred only through expansion of U.S. extraterritorial jurisdiction to foreign plaintiffs who were affected only in foreign commerce.

III. IN EXPLAINING THE EXTRATERRITORIAL REACH OF THE FTAIA, CONGRESS OBSERVED SIMILAR CONCERNS ABOUT COMITY AND THE INTERESTS AND ENFORCEMENT EFFORTS OF FOREIGN NATIONS

The legislative history of the FTAIA reveals that Congress was motivated in the Act's passage by the same concerns that we emphasize here. Congress was aware, for instance, of the efforts other nations have undertaken to protect competition in international commerce, and it was aware of the interests other countries have in regulating their own industries and economies. Congress's awareness thus motivated it to enact the FTAIA to *limit*, and not expand, the application of United States antitrust laws so that it would reduce conflicts between U.S. regulations and policies and those of other nations. The court of appeals' opinion failed to take into consideration these indications of legislative intent when it construed the Act.

A. Congress Relied On The Existence Of Effective Antitrust Enforcement As A Reason To Enact The FTAIA To Limit Extraterritorial Application Of U.S. Antitrust Law

In passing the FTAIA, Congress observed that United States laws were not the only source of antitrust regulation. For example, the House Judiciary Committee Report on the FTAIA reported that "the committee recognized the increased sensitivity of other nations to antitrust considerations and cartel activity," and it explained that the FTAIA's more precise delineation of U.S. antitrust jurisdiction "in no way limits the ability of a foreign sovereign to act under its own laws" against cartels "having unlawful effects in its territory." H.R. Rep. No. 97-686, at 13-14 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498-99.

During the hearings on the FTAIA, testimony focused on the development of other nations' antitrust regimes and their impact on the scope of United States laws. It was emphasized that, even in cases where "American antitrust laws do not apply, it does not follow that antitrust principles do not apply," because "developments in foreign antitrust law in the last 10 or 15 years" meant that "we know that those laws are being enforced more vigorously." *Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 26 (1981) (statement of Robert Pitofsky). In acknowledging the development of other nations' competition laws, the testimony invoked familiar principles of comity and respect for foreign sovereigns. For instance, there was testimony that "[m]ore and more of our trading partners are enacting and enforcing their own restrictions," and that, by refraining from regulating foreign transactions, "we allow those foreign countries to decide what quality and level of competition they want to see within their borders" and avoid the United States' being charged with "'undue intrusion' and of 'exporting its economic values' to areas of the world where they are not especially congenial." *Id.* at 44. Likewise, it was observed that "a vast majority of countries" have enacted their own antitrust laws, and thus Congress was reassured that it could "feel a little more relaxed in leaving conduct unprotected by our own antitrust laws because it is likely to be" regulated by others. *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 79 (1981) ("House Hearing") (statement of John Shenefield, Partner at Milbank, Tweed, *et al.*).

In terms similar to those principles of international law that require respect for other nations' sovereign interests when determining the scope of extraterritorial jurisdiction, the legislative history explained that federal courts should "consider the defendant's nationality, the relative interests of the United States and other nations that are affected by the transaction, the location of the conduct, and similar factors." *Id.* at 109 (statement of Martin Connor, Washington Corporate Counsel for General Electric on behalf of the Business Roundtable).

B. Congress Was Sensitive To The Diplomatic And Political Ramifications Of Expansive U.S. Antitrust Jurisdiction

The testimony on the FTAIA also made it apparent that Congress was sensitive to the discord that overly expansive extraterritorial applications of U.S. law have created with its allies and trading partners. Representative Rodino, Chairman of the House Judiciary Committee, observed that passage of the Act meant that "[s]ome foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners." House Hearing at 2 (statement of Hon. Peter Rodino). Other testimony similarly noted the "general consensus that U.S. antitrust law should not be obsessed by a missionary zeal to protect competition within foreign markets or protect competitive conditions in those markets," because an expansive application of U.S. law to transactions with effects in foreign nations had caused "political difficulties"; rather, that testimony emphasized the virtue of the FTAIA in "ameliorating the international political tension that now exists in the area of antitrust enforcement." *Id.* at 84 (statement of James Atwood). One statement summarized the political and diplomatic ramifications of an expansive application of U.S. antitrust laws:

> The creeping application of American antitrust to foreign-market effects adds to the perception of many foreign governments that United States law is an unguided missile, intruding into matters of principally foreign concern without adequate justification. Under the expansive interpretations of the Sherman Act . . . foreign plaintiffs would be able to invoke American antitrust to frustrate the local industrial or social policies of their home governments. By making clear that effects in foreign markets are the domain of foreign rather than American law, [the FTAIA] would put American practice in a more rational and diplomatically defensible mode. No other country attempts to regulate effects in foreign markets through the enforcement of its own antitrust law. . . . By clarifying and defining [the] allocation of enforcement responsibility, [the FTAIA] would held [sic] alleviate the heated extraterritoriality debate now in progress between the United States and its trading partners.

Id. at 91-93 (statement of James Atwood).

In expressing these concerns about avoiding diplomatic and political dissonance with other nations, the legislative history recounted many of the same differences between U.S. antitrust enforcement and the competition laws of other countries that we have emphasized. For instance, "[t]he combination of sanctions available in the United States, including criminal felony liability, parens patriae recoveries, class actions, and recovery of attorneys' fees," was "unparalleled" in international regulation, and "[t]hese gross disparities in economic systems raise fundamental questions of economic policy." *Id.* at 107 (statement of Martin Connor). The legislative history further reflected concern that other nations "have displayed growing hostility toward the extra-territorial reach of our antitrust laws" and that "[m]any nations have laws on their books that prohibit cooperation with U.S. antitrust authorities, interfere with U.S. antitrust prosecutions and defenses, and negate the operation of our laws in their territories." *Id.*

These concerns led to the conclusion that "there is no imperative that justifies any longer" U.S. regulation of "overseas consumers or foreign competitors." *Id.* Accordingly, "[r]espect for these differences in legal and economic systems requires not only that our laws be well-defined, but also that they not be overly expansive in their reach." *Id.* For those reasons, the FTAIA's jurisdictional reach had to be clarified – "we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory." *Id.*

Moreover, Congress expressed its belief that a narrower, more-precisely defined sphere of U.S. antitrust jurisdiction would encourage other nations to further develop and enforce their own competition laws. As the House Judiciary Committee Report explained, "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." H.R. Rep. No. 97-686, at 14, *reprinted in* 1982 U.S.C.C.A.N. at 2499. *See also* House Hearing at 85 (statement of James Atwood) (leaving the enforcement of transactions with foreign effects to other nations "will encourage the development of foreign antitrust programs that will be similar to ours" and "will bring about over time a better, clearer, more effective regime of antitrust cooperation across borders"); *id.* at 92-93 (noting that enacting FTAIA "would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States," and thus that the Act "is an invitation to our trading partners to strengthen and develop their *own* antitrust programs"); *id.* at 94 (FTAIA "should serve as an invitation for the further development of national antitrust programs in other countries" and "should serve in the long run to advance the cause of vigorous, competitive international trade").

IV. EXPANSIVE EXTRATERRITORIAL APPLICATION OF UNITED STATES JURISDICTION THREATENS TO UNDERMINE INTERNATIONAL COOPERATION AND GLOBAL ANTITRUST ENFORCEMENT

In analyzing the deterrence effects of its extension of United States antitrust laws to foreign plaintiffs, the court of appeals failed to consider the detrimental impact an expansive application of U.S. law would have on the cooperation that is vital to international investigation and prosecution of cartels and enforcement of judgments. The investigation and prosecution of global conspiracies in restraint of trade often depends upon the cooperation and

coordination of countries where the offenders might be domiciled or located. For that reason, the United States has entered into cooperative treaties or agreements with other nations, including the Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291. *See also* Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, 34 U.S.T. 388, T.I.A.S. No. 10365; Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted at* 4 Trade Reg. Rep. ¶ 13,503. *See generally* IA Areeda & Hovenkamp, *supra*, ¶ 275, at 411 n.6. Left unchecked, the court of appeals' decision threatens to undermine those efforts.

A. Foreign Concerns About U.S. Exercises Of Extraterritorial Jurisdiction Have Produced A Variety Of Counter-Reactions

Historically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty. Such encroachments by U.S. courts invariably will alter the relationships between nations. The effectiveness of international treaties is threatened when other nations conclude that the U.S. has overreached in the application of its domestic laws to foreign conduct. *See* Buxbaum, *supra*, 26 Yale J. Int'l L. at 252. As Deputy Assistant Attorney General Delrahim has stated, "the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries." Delrahim, *supra*, at 8. *See also id.* at 17 ("It is self-centered and ultimately self-defeating to set ourselves up as the world's antitrust policeman.").

German officials already have expressed concern about the court of appeals' expansive application of U.S. jurisdiction in this case. In a recent lecture given at an antitrust conference in Bonn and attended by United States and EU officials, former German Economic Minister (and recent chief German negotiator of the German-U.S. forced labor settlement) Otto Graf Lambsdorff commented on the *Empagran* decision. Mr. Lambsdorff opined that "American antitrust laws were created to protect the American consumer and not to regulate the competitive conditions in foreign countries," and he observed that "[a] German court – as well as every other European – would obviously deny jurisdiction" were the roles reversed, because "[a]ny other decision would rightly provoke protest by both US companies and the US government." Antitrust Law as a Regulatory Factor in a Globalized Market Economy, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany, at 3 (May 20, 2003) (hereinafter "Bonn Lecture").

One consequence of foreign disapproval with U.S. encroachments on other nation-states' antitrust enforcement efforts will be a refusal to enforce judgments obtained in U.S. lawsuits. "States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant." *Restatement (Third)* intro. note, at 304; IA Areeda & Hovenkamp, *supra*, ¶ 275, at 410 (noting an "impediment to effective remedies is that foreign law and foreign courts may assert priority with respect to behavior abroad, regardless of an American court's decree").[10] This

[10] *See also* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 29 (1987) (noting that "exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns," "can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields," and also noting that these assertions "can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states") (footnotes omitted).

reaction, in turn, has its own consequences for international relations and diplomacy. *See* Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J. Int'l L. 44, 46 (2001) ("International tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values.").

In addition to refusing to enforce U.S. judgments, nations have enacted "blocking statutes" to protest U.S. transnational assertions of jurisdiction. *See* Joelson, *supra*, at 58. These statutes have taken several forms. For instance, "the Provinces of Ontario and Quebec have long had statutes prohibiting the removal of documents of Ontario and Quebec corporations pursuant to a foreign court order." I Fugate, *supra*, § 3.11, at 279. The United Kingdom, France, and Australia have similar laws. *See id.* at 279-80. Canadian officials have explained their objection to the United States' expansion of its antitrust jurisdiction: "For one government to seek to resolve [a policy] conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right." J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195, 213 n.46 (1978).[11]

These and other international reactions to the extraterritorial application of U.S. law should make apparent the

[11] Some countries have gone even further to "block" the extraterritorial reach of U.S. antitrust laws. In response to the treble damages allowed in private Sherman Act suits, for example, the United Kingdom enacted "a prohibition on the enforcement by United Kingdom courts of foreign judgments involving the award of multiple damages." A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257, 257 (1981). That statute also provides a right of "claw-back" – *i.e.*, "a right for British citizens or businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element from the original plaintiff by an action in a United Kingdom court." *Id.* Canada has enacted similar legislation. *See* I Fugate, *supra*, § 3.17, at 309.

high stakes of this case.[12] If the court of appeals' unprecedented expansion of U.S. antitrust jurisdiction stands, more nations are likely to enact similar statutes in response to concerns about their nationals being subjected ever more frequently to the threat of treble damages and the burdens of U.S. court litigation. As a result, the court of appeals' judgment is likely to jeopardize international cooperation in the battle against cartels.

B. The Decision Below Impinges On Governmental Leniency Policies

International cooperation on antitrust enforcement is not the only area threatened by the court of appeals' decision. The investigation, prosecution, and deterrence of international cartels through the DOJ's corporate leniency program has been effective, and it is far less offensive to principles of international law, comity, and foreign sovereignty than are private antitrust suits in U.S. courts. As the International Competition Policy Advisory Committee ("ICPAC") reported in 2000 to the Attorney General and Assistant Attorney General for Antitrust, international enforcement through these policies "has occurred without offending the sovereign interests of other jurisdictions to the same degree that can arise in the context of extraterritorial enforcement. Some of the persistent concerns associated with international enforcement are sidestepped

[12] In the trade area, EU institutions are drafting a regulation against the Anti-Dumping Act of 1916, 15 U.S.C. § 72, which prohibits the selling at below cost of products with the intent of destroying or injuring a United States industry. Application of that law can have significant extraterritorial effects. *See, e.g., Goss Graphic Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001). For that reason, the EU has taken strong exception and announced that it will pass a regulation seeking retaliatory and protective measures against the United States for failing to repeal the 1916 law that has been held to violate international trade law by the WTO. *See* EU Press Release, *EU seeks retaliatory and protective measures in US 1916 Anti-Dumping Act dispute* (Sept. 22, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1274|0|RAPID&lg=EN&display=.

when a firm or an individual cooperates pursuant to a leniency policy, including issues of personal jurisdiction, service of process, and access to foreign-located evidence and individuals." ICPAC, *Final Report* at 184-85.

The court of appeals' decision threatens to undermine the DOJ's corporate leniency program as described by petitioners and the Solicitor General. *See* Pet. 8; Pet. App. 78a. It also could have detrimental consequences for similar programs in Germany, the EU, and other parts of the world. In discussing the EU's corporate leniency program, the EC has noted that "certain undertakings involved in . . . illegal agreements are willing to put an end to their participation and inform [the EC] of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed." Official Journal of the European Communities, *Commission notice on immunity from fines and reduction of fines in cartel cases* ¶ 3 (2002/C 45/03). Because the "Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it," and similarly was of the view "that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value," it determined to "grant an undertaking immunity from any fine which would otherwise have been imposed" if certain conditions were met. *Id.* ¶¶ 4-8.

Germany, likewise, considers its leniency policies to be an important part of its enforcement efforts, and it already has enjoyed success with its program. In June 2003, the Federal Cartel Office reported to the German Parliament on its activities in 2001 and 2002 in the battle against cartels. That report noted that the leniency rule announced in April 2000 has "showed significant [positive] effect in the prosecution of cartels." June 2003 Federal Cartel Report at 45.

These leniency policies seek to balance the interests of disclosure, deterrence, and punishment. By contrast, the interests in disclosure and reform are greatly hindered

when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy. These disincentives become overwhelming when treble damages are made available not only to U.S. consumers, but also to all consumers around the world. At that point, the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.[13] The court of appeals' decision gave insufficient consideration to these important factors when it expanded the scope of U.S. antitrust jurisdiction under the FTAIA. And the court failed to consider that its decision would actually hinder, not improve, deterrence of global conspiracies by jeopardizing international cooperation on antitrust enforcement. That erroneous judgment should be corrected by this Court.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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[13] *Cf.* Michael L. Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 Antitrust 41, 42-43 (Sum. 2001) (detailing the exposure to significant antitrust civil liability that cooperating criminal defendants face).

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In The
Supreme Court of the United States

F. HOFFMANN-LA ROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN S.A., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May foreign plaintiffs pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside United States commerce?

PARTIES TO THE PROCEEDING

Petitioners, who were Appellees in the United States Court of Appeals for the District of Columbia Circuit, are as follows: F. Hoffmann-La Roche, Ltd.; Hoffmann-La Roche Inc.; Roche Vitamins Inc.; BASF AG; BASF Corporation; Rhône-Poulenc Animal Nutrition Inc.; Rhône-Poulenc Inc.; Hoechst Marion Roussel S.A.; Rhône-Poulenc S.A.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food USA, Inc.; Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corp.; Daiichi Fine Chemicals, Inc.; Eisai Co., Ltd.; Eisai U.S.A., Inc.; Eisai Inc.; Akzo Nobel Chemicals B.V.; Akzo Nobel Inc.; Bioproducts Incorporated; Chinook Group Ltd.; Cope Investments Ltd.; Degussa AG; Degussa Corp.; DuCoa, L.P.; DCV, Inc.; EM Industries, Inc.; Merck KGaA; E. Merck; Lonza Inc.; Lonza AG; Alusuisse-Lonza Group Ltd.; Mitsui & Co., Ltd.; Nepera, Inc.; Reilly Chemicals, S.A.; Reilly Industries, Inc.; Sumitomo Chemical Co., Ltd.; Sumitomo Chemical America, Inc.; Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents, who were Appellants in the United States Court of Appeals for the District of Columbia Circuit, are as follows: Empagran, S.A.; Nutricion Animal, S.A.; Winddridge Pig Farm; Brisbane Export Corp. Pry, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 ("FTAIA"), 15 U.S.C. § 6A, WAS NOT INTENDED TO EXPAND UNITED STATES ANTITRUST JURISDICTION TO REACH ALLEGED INJURIES TO FOREIGN CONSUMERS FOR PURCHASES IN FOREIGN MARKETS FROM FOREIGN CORPORATIONS, NOR WERE THE SHERMAN OR CLAYTON ACTS IT SOUGHT TO CLARIFY	3
A. The FTAIA Sought to Clarify the Limits of United States Antitrust Jurisdiction in United States Foreign Commerce, Not Expand that Jurisdiction	3
B. If the FTAIA Had Been Seen to Expand U.S. Extraterritorial Jurisdiction to Foreign Corporations That Allegedly Injured Foreign Purchasers in Foreign Markets, There Would Have Been a Storm of Criticism by Foreign Governments	4

TABLE OF CONTENTS – Continued

Page

C. The Decision in *Pfizer* Does Not Change the Fact that the FTAIA Did Not Bestow on Foreign Purchasers the Right to Damages for Transactions Only in Foreign National Markets, or that Such a Right Was Not Bestowed by the Sherman or Clayton Acts, Which the FTAIA Sought to Clarify. 5

II. INTERPRETING THE FTAIA TO ALLOW FOREIGN PURCHASERS OF GOODS IN FOREIGN MARKETS TO BRING SUIT AGAINST FOREIGN CORPORATIONS UNDERMINES COMITY, THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES TO GOVERN WITHIN THEIR NATIONAL TERRITORIES 6

III. AFFIRMING THE DECISION BELOW WOULD HAVE SERIOUS ADVERSE IMPLICATIONS, WHICH CANNOT BE FULLY ANTICIPATED, FOR REGULATION OF THE JAPANESE ECONOMY AND SOCIETY BY THE GOVERNMENT OF JAPAN..... 8

CONCLUSION..... 11

TABLE OF AUTHORITIES

Page

CASES

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 6

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) 6, 7

Hilton v. Guyot, 159 U.S. 113 (1895)..... 7

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)..... 5

Ore. State Union No-su-kon I v. Mansei Ko-gyo Co., 51 MINSHŪ 2573 (Sup. Ct., July 11, 1997) (Japan) 8

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 5, 6

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 9

Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100 (E.D. Pa. 1981) 4

STATUTES

Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act"), Law No. 54 of April 14, 1947 (Japan)..... 8

Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 *et seq.* 3

Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

BOOKS

J.L. Brierly, *The Law of Nations* 162 (6th ed. 1963)..... 6, 7

A.V. Lowe, *Extraterritorial Jurisdiction* (1983)..... 4

Spencer Weber Waller, 1 *Antitrust and American Business Abroad* (3d ed. 1997)..... 5

MISCELLANEOUS SOURCES

Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999..... 10

Annual Report on Competition Policy in Japan (January-December 2001), JFTC Doc. No. DAFFE/COMP(2002)27/21..... 8

H.R. Rep. No. 97-686 (1982)..... 4

http://www.internationalcompetitionnetwork.org (last visited Jan. 27, 2004)..... 11

Recommendation of the Council Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade, OECD Doc. No. C(95)130/FINAL (July 27, 1995)..... 11

Restatement (Third) of Foreign Relations Law § 403 (1986)..... 7

INTEREST OF THE AMICUS CURIAE[1]

Petitioners in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales in various national markets. The Government of Japan has significant economic, political, and legal interests in ensuring that companies based in Japan shall comply with the Japanese legal system, and that Japanese companies running businesses elsewhere shall comply with "reasonable" jurisdictional requirements of other nations. Japan also has a significant interest in making certain that Japanese companies are not subject to the unreasonable extraterritorial reach of United States competition and class action laws by private foreign plaintiffs who purchased vitamins from Petitioners only in foreign markets and are now seeking treble damages in private lawsuits filed in United States courts against Japanese companies for such foreign purchases.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. In accordance with Rule 37.6, the Government of Japan states that Sonnenschein Nath & Rosenthal LLP recently acted as local counsel in Kansas state court for Petitioners Eisai Co., Ltd., Eisai U.S.A., Inc., and Eisai, Inc. ("Eisai") in a related state indirect-purchaser antitrust case, *Stephen L. Cox, et al. v. F. Hoffmann-La Roche, Ltd., et al.*, No. 00 C 1890 (Dist. Ct. of Wyandotte County, Kansas). This case has now settled. In addition, Sonnenschein Nath & Rosenthal LLP acted for Eisai more than four years ago in separate federal proceedings relating to vitamins. At present, Sonnenschein Nath & Rosenthal LLP does not represent Eisai. No counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring actions in United States courts for alleged injuries under United States antitrust laws. There is nothing in the legislative history of the FTAIA, or the Sherman and Clayton Acts it sought to clarify, to suggest that U.S. antitrust jurisdiction over foreign firms in foreign markets should be expanded, nor does this Court's decision in *Pfizer* change the fact that no statute expands such judicial jurisdiction. Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the Government of Japan to regulate its own economy and govern its own society. Therefore, the decision of the Court of Appeals for the District of Columbia should be reversed.

ARGUMENT

I. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 ("FTAIA"), 15 U.S.C. § 6A, WAS NOT INTENDED TO EXPAND UNITED STATES ANTITRUST JURISDICTION TO REACH ALLEGED INJURIES TO FOREIGN CONSUMERS FOR PURCHASES IN FOREIGN MARKETS FROM FOREIGN CORPORATIONS, NOR WERE THE SHERMAN OR CLAYTON ACTS IT SOUGHT TO CLARIFY.

A. The FTAIA Sought to Clarify the Limits of United States Antitrust Jurisdiction in United States Foreign Commerce, Not Expand that Jurisdiction.

The FTAIA was a part of, and complement to, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 *et seq.* Both laws sought to promote U.S. exports by seeking to assure American businesses that they were not subject in foreign commerce to a "stricter regimen of [U.S.] antitrust than their competitors of foreign ownership." H.R. Rep. No. 97-686, at 10 (1982). The FTAIA made clear that:

> American-owned firms that operate entirely abroad or in United States export trade [are freed] from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite [U.S.] domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors.

Id. The law was enacted to "level the playing field" between U.S. and foreign companies overseas, and to promote foreign antitrust enforcement over foreign conduct in foreign markets by *reducing* the perceived scope of U.S.

antitrust jurisdiction abroad. *See* H.R. Rep. No. 97-686, at 14 ("[T]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets" under their competition laws.). There is nothing in the legislative history of the FTAIA to suggest that it was intended to expand U.S. antitrust jurisdiction to subject foreign firms in foreign markets to U.S. law.

B. If the FTAIA Had Been Seen to Expand U.S. Extraterritorial Jurisdiction to Foreign Corporations That Allegedly Injured Foreign Purchasers in Foreign Markets, There Would Have Been a Storm of Criticism by Foreign Governments.

The early 1980s were a time of international tension over the extraterritorial application of U.S. antitrust law. In 1982, many close allies of the United States were concerned that some U.S. antitrust enforcement against foreign persons for conduct in foreign nations, allegedly aimed at causing direct, substantial, and reasonably foreseeable injury in U.S. markets, exceeded established international law standards. *See generally* A.V. Lowe, *Extraterritorial Jurisdiction* (1983). Japan, for example, was concerned about a U.S. private antitrust lawsuit brought against the Japanese color television industry for alleged cartel activity in Japan, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). In addition, the United Kingdom, Australia, and Canada all passed "frustration of judgments" statutes preventing the enforcement of foreign antitrust judgments inconsistent with their sovereignty and national interests.

See Spencer Weber Waller, 1 *Antitrust and American Business Abroad* § 4:17 (3d ed. 1997).

The Supreme Court also appeared to recognize this tension when it began its analysis in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) by stating its understanding that "American antitrust laws do not regulate the competitive conditions of other nations' economies." By expanding U.S. jurisdiction to give Japanese consumers a U.S. legal claim against Japanese and other manufacturers selling into the Japanese market, the D.C. Court of Appeals' decision has done just that.

C. The Decision in *Pfizer* Does Not Change the Fact that the FTAIA Did Not Bestow on Foreign Purchasers the Right to Damages for Transactions Only in Foreign National Markets, or that Such a Right Was Not Bestowed by the Sherman or Clayton Acts, Which the FTAIA Sought to Clarify.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), the Court recognized that "[t]here is no statutory provision or legislative history that provides a clear answer" to whether a foreign government is a person under U.S. antitrust law. The Court concluded that "it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." *Pfizer*, 434 U.S. at 312. The dissent criticized "this undisguised exercise of legislative power" by the Court in answering the question judicially. *Id.* at 320. A distinguishing feature in *Pfizer*, absent in the Decision below, is that one of the factors the majority relied upon when creating, *de novo*, this foreign governmental right to sue was that to

not do so "would manifest a want of comity and friendly feeling" for foreign nations. *Id.* at 319. The Decision below seems to ignore considerations of comity.

It is apparent in reviewing the history of Sherman Act anti-cartel enforcement from *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) through *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) that there is no statutory provision or legislative history to the Sherman and Clayton Acts that justifies the Decision below. The Court would go well beyond what it did in *Pfizer* if the Court of Appeals' decision were affirmed, given the lack of any consideration of its impact on foreign sovereign jurisdictions.

II. INTERPRETING THE FTAIA TO ALLOW FOREIGN PURCHASERS OF GOODS IN FOREIGN MARKETS TO BRING SUIT AGAINST FOREIGN CORPORATIONS UNDERMINES COMITY, THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES TO GOVERN WITHIN THEIR NATIONAL TERRITORIES.

Since the seventeenth century and the rise of the nation state, the cornerstone of public and private international law has been that nation states are equal sovereigns, entitled to mutual respect and deference in the exercise of their sovereignty. As J.L. Brierly, the Oxford scholar, wrote in 1928:

> At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.

> When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory[.]

J.L. Brierly, *The Law of Nations* 162 (6th ed. 1963). Judicial comity reflects this principle in declining to prescribe where matters are more appropriately adjudicated elsewhere, thereby respecting the sovereign equality of states. *See generally Hilton v. Guyot*, 159 U.S. 113 (1895); *see also* Restatement (Third) of Foreign Relations Law § 403 (1986) (outlining the limitations on a state's jurisdiction to prescribe, including the consideration of the likelihood of conflict with regulation by another state). The Court of Appeals extended U.S. jurisdiction, without clear Congressional direction, so as to interfere with the regulation of transactions between producers and consumers in foreign national markets unrelated to the U.S. market. Doing so alters and, as discussed below, undermines Japanese sovereignty over the Japanese market and Japanese people. *See* Restatement (Third) of Foreign Relations Law § 403(3) (indicating that in exercising jurisdiction over a person or activity, "a state should defer to the other state if that state's interest is clearly greater"). "[S]tatutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part).

III. AFFIRMING THE DECISION BELOW WOULD HAVE SERIOUS ADVERSE IMPLICATIONS, WHICH CANNOT BE FULLY ANTICIPATED, FOR REGULATION OF THE JAPANESE ECONOMY AND SOCIETY BY THE GOVERNMENT OF JAPAN.

Japanese law and policy already address the interests of Japanese consumers with regard to transactions that impact the Japanese market. Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act"), Law No. 54 of April 14, 1947, which is enforced by competent authorities such as the Japan Fair Trade Commission ("JFTC"). Prime Minister Koizumi has stated that one of his government's goals is "[t]he enhancement of the JFTC system as the guardian of the market to establish [in Japan] a competition policy appropriate for the 21st century." *Annual Report on Competition Policy in Japan (January-December 2001)*, JFTC Doc. No. DAFFE/COMP(2002)27/21, at 3 (quoting Prime Minister Jun-ichiro Koizumi, Policy Speech (May 7, 2001)). However, U.S. lawyers will become antitrust prosecutors for the Japanese market if the Decision below is upheld.

Japanese law does not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability. The Supreme Court of Japan has ruled that foreign judgments may not be enforced in Japanese courts beyond the level of actual compensatory damages. *Ore. State Union No-su-kon I v. Mansei Ko-gyo Co.*, 51 MINSHŪ 2573 (Sup. Ct., July 11, 1997).

If the Decision below is upheld, a large number of lawsuits, including class action lawsuits, requesting

punitive damage awards and an automatic award of attorneys' fees to prevailing plaintiffs are likely to be filed against persons (including juridical persons) in Japanese territory by persons having no connection to the United States. The Government of Japan is concerned that exercise by U.S. courts of such extraterritorial jurisdiction against its sovereign will would be inappropriate. Furthermore, the coexistence of class actions with punitive damages in the United States adds to the difficulties. If the Decision below is upheld, it would cause "forum shopping" in U.S. courts by plaintiffs from all over the world who seek large punitive damages awards through class action lawsuits.

Encouraging Japanese and other foreign consumers with no connection to the United States to file lawsuits under U.S. law could have a severe impact on Japanese interests. Private plaintiffs may selectively choose to sue only one or two alleged participants in an international cartel, and those selected defendants have no right of contribution from the remaining cartel participants. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). This means that if U.S. courts exercise such extraterritorial jurisdiction, a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants. This could, at the least, put Japanese firms at a serious competitive disadvantage with other firms in that industry. In *Radcliff*, 451 U.S. at 646, the Court recognized that there were "far-reaching" policy questions raised by an antitrust defendant's claimed right to contribution, which were beyond the courts' competence to resolve. That can be no less true with respect to the Decision below.

The likely impact of applying Federal Rule of Civil Procedure 23, relating to class actions, to a worldwide class of foreign consumers also raises a number of questions. Is it practicable to join consumers as a class in up to 150 national markets, with disparate market structures and conditions? Is it practicable to certify a worldwide class of foreign consumers potentially speaking hundreds of languages? How is a U.S. District Court to decide what is the "best notice practicable" to global class members? United States rules presume that class members wish to participate unless they give notice of opting out. Making that determination for Japanese consumers in the Japanese market, without the input of the Japanese government, is a concern. Who is to assure that the U.S. class action lawyers are properly serving the interests of their Japanese "clients"? Are Japanese government views of effective representation to be taken into account by the U.S. court?

The Government of Japan is fully confident that the U.S. government would never seek to expand its extraterritorial jurisdiction in such a dramatic fashion as to governmental enforcement. However, it is particularly troublesome that this right to, at the least, interfere with Japanese governmental regulation of the Japanese market would be given to private U.S. attorneys with little experience in international diplomacy and cooperation.

There is a network of international relationships among national antitrust authorities which provides lines of direct communication to lessen or remove sovereign national conflicts. Japan and the United States have a bilateral antitrust cooperation agreement. *See* Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on

Anticompetitive Activities, Oct. 7, 1999. Japan and the United States are members of the Organisation for Economic Co-operation and Development ("OECD"). The 1995 Recommendation of the OECD Council recognizes the need for Member countries to "use moderation and self restraint in the interest of cooperation in the field of anticompetitive practices." *See* Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. No. C(95)130/FINAL (July 27, 1995). The Council encourages Member countries to exchange information, coordinate action, consult, and conciliate. Furthermore, there is the International Competition Network ("ICN"), in which the antitrust agencies of many of the world's governments consult to harmonize standards and promote best practices in antitrust enforcement. *See* http://www.internationalcompetitionnetwork.org (last visited Jan. 27, 2004). There is no comparable network by which foreign antitrust agencies, or their governments, can consult with private U.S. antitrust lawyers or with U.S. courts having jurisdiction over global class actions. The Government of Japan is concerned that neither national governments nor national courts are well suited to supervising and resolving the conflicts that would result if the Decision below is not reversed.

CONCLUSION

The FTAIA should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring suits in United States courts for alleged injuries under United States antitrust laws. Accordingly,

the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

F. HOFFMAN-LA ROCHE, LTD., *et al.*,
PETITIONERS,

v.

EMPAGRAN, S.A., *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* SUPPORTING REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF U.S. LAW, INTERNATIONAL LAW, AND INTERNATIONAL COMITY 3

A. The FTAIA Should Be Construed Consistently with Principles of International Law and Comity Embodied in U.S. Jurisprudence 4

B. The Broad Interpretation Respondents Propose Would Be "Unreasonable" and Impermissible Under U.S. and International Law 6

C. Under Principles of Comity, U.S. Courts Should Not Exercise Jurisdiction in the Circumstances of this Case. 16

II. MUTUAL, MULTINATIONAL COOPERATION AND ACCOMMODATION ARE ESSENTIAL TO EFFECTIVE ANTITRUST ENFORCEMENT 17

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Page

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 4, 5, 8

Hartford Fire Ins. Co. v. Cal.,
509 U.S. 764 ..... 8, 10, 16

Hilton v. Guyot,
159 U.S. 113 (1895) 6

Lauritzen v. Larsen,
345 U.S. 571 (1953) 9, 10, 14

Mannington Mills, Inc. v. Congoleum Corp.,
595 F. 2d 1287 (3d Cir. 1979) 16

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 15

McCulloch v. Sociedad Nacional,
372 U.S. 10 (1963) 8

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 4

New York Central R.R. Co. v. Chisholm,
268 U.S. 29 (1925) 4, 5

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358 U.S. 354 (1959) 9, 10, 16

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148 F.2d 416 (2d Cir. 1945) 5, 8, 9

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THE INTEREST OF THE *AMICUS CURIAE*

The Government of Canada wishes to express its appreciation to this Court for the opportunity to submit its views as *amicus curiae* on the important issue of the extraterritorial application of the laws of the United States.[1]

The Government of Canada and Canadian citizens have a particular interest in how principles of comity and international law that are recognized in both the United States and Canada are brought to bear on the resolution of this case. Canada has an equally strong interest in the practical consequences of this Court's decision both because of the interdependence of the economies of Canada and the United States, which enjoy the largest bilateral trading relationship in the world, and because of the significant effects the extraterritorial application of U.S. antitrust law is likely to have on the administration of Canada's own competition laws and policies.

In 1889, Canada became the first industrialized nation to enact antitrust legislation. Canada's antitrust laws currently are codified in a single comprehensive statute, the Competition Act, R.S.C. 1985, ch. C-34, as amended (the "Competition Act").[2] These laws are similar in many respects to those of the United States as they relate to price-fixing cartels. In most circumstances, naked price-fixing cartels are subject to the same criminal denunciation in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for a party neither authored this brief nor any part of it, and no person or entity other than *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. The parties' consents to this submission have been filed concurrently with this brief pursuant to Supreme Court Rule 37.3(a).

[2] *Available at* http://laws.justice.gc.ce/en/C-34/.

Canada as in the United States. Canada reserves the harshest punishment for international and domestic horizontal cartel behavior with maximum fines of up to Cdn $10 million and imprisonment of up to 5 years. Like the United States, Canada provides for a civil cause of action for victims of cartel behavior.

Differences between Canada's antitrust laws and those of the United States reflect economic policy decisions of Canada's lawmakers and Canada's unique socio-economic conditions. For example, Canada's prohibitions of cartel behavior are predicated upon the economic effect of the behavior (a combination of market power and a likelihood of injury to competition). Further, in contrast to the United States, Canada has determined that punitive sanctions for illegal cartel behavior be imposed only through prosecutions initiated by the Government. Civil plaintiffs are limited to the recovery of their actual damages and associated costs. The structure of these antitrust remedies reflects Canada's sovereign choices regarding the appropriate measures to combat anticompetitive behavior within its territory.

SUMMARY OF THE ARGUMENT

The Government of Canada submits that recognized legal principles militate against the broad extraterritorial application of the Sherman Act under the circumstances of this case. United States legal principles limit the exercise of extraterritorial jurisdiction over non-nationals when such exercise is "unreasonable." These principles parallel principles of international law and comity that are recognized and applied by Canada and other nations. In the United States, these principles of international law and comity have found expression in decisions of this Court and the lower federal courts addressing the extraterritorial

regulation of commerce and anticompetitive behavior under U.S. antitrust laws.

Cooperation and accommodation are essential to the orderly and harmonious regulation of international commerce by the family of nations. Both are reflected in the principles of comity and are essential to the functioning of the closely related economies of the United States and Canada. Disregard of these fundamental principles would not only complicate and impede the enforcement of antitrust policies by many other countries, but also would intrude upon and derogate the sovereign prerogatives, rights, and interests of the Government of Canada.

The legal principles that foreclose the unreasonable exercise of extraterritorial jurisdiction have ready application to the facts of this case. From the perspective of the United States, the respondents are foreign nationals. The transactions on which they base their claims occurred solely in foreign commerce and had no effects in the United States or on U.S. commerce. The only real nexus that their claims have with the United States is that the United States is being asked to lend its forum, and its punitive remedies, to the resolution of an otherwise wholly foreign dispute.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF U.S. LAW, INTERNATIONAL LAW, AND INTERNATIONAL COMITY

This case implicates principles of U.S. law, of international law, and of comity with respect to two distinct issues. The first is the proper statutory construction of the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, which has divided the United States Courts of Appeals. The second is whether U.S. courts properly may assert jurisdiction under the circumstances of this case in

light of considerations of comity, even if the broad jurisdictional construction of the statute urged by respondents were upheld.

In addition to statutory construction, principles of international law and comity also come into play when U.S. courts consider whether they should exercise the broadest jurisdiction authorized by a statute or whether, under the facts of a particular case, U.S. courts should decline to exercise jurisdiction. Under U.S. law, this comity of courts, variously treated as a doctrine of judicial restraint or of conflict of laws, would foreclose the exercise of jurisdiction by U.S. courts under the circumstances of this case.

A. The FTAIA Should Be Construed Consistently with Principles of International Law and Comity Embodied in U.S. Jurisprudence

This Court has long held that international considerations are an essential element of statutory construction when determining whether or not a U.S. statute applies beyond the territorial limits of the United States. Two hundred years ago this year, Chief Justice Marshall articulated what has become a fundamental canon of U.S. statutory construction, namely, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

This Court has repeatedly reaffirmed the principles that lay behind Chief Justice Marshall's maxim. As recently as 1991, for example, this Court cited *New York Central Railroad Co. v. Chisholm*, 268 U.S. 29 (1925), as an instance in which a statute properly was construed as lacking extraterritorial application despite the apparent breadth of its jurisdictional grant. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) ("*Aramco*") (*citing Chisholm*). In *Chisholm*,

this Court explicitly relied on principles of comity to determine that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* – which applied to railways involved in "interstate or foreign commerce" and in commerce between "any of the States or territories and any foreign nation or nations" – lacked extraterritorial effect commensurate with its literal scope. Beginning from the proposition that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," this Court stated that another country's prosecution for those acts not only

> would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

268 U.S. at 32 (internal quotation omitted). Accordingly, this Court held that considerations of comity should lead "in cases of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits" over which the lawmaker has "general and legitimate power." *Id.*

These principles of comity have become a firmly established part of the jurisprudence of the United States. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also* Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) ("Restatement"), the commentary to which confirms the "rule of construction" that statutes must be construed whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

These principles of comity are also firmly established in Canadian jurisprudence:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Morguard Invs., Ltd. v. De Savoye, [1990] S.C.R. 1077, 1096 (Can.) (*citing Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

B. The Broad Interpretation Respondents Propose Would Be "Unreasonable" and Impermissible Under U.S. and International Law

Comity is reflected in the principle of U.S. law that the extraterritorial application of a U.S. law is permissible only to the extent that such an exercise of jurisdiction would not be "unreasonable." Restatement § 403. Indeed, the principle that "an exercise of jurisdiction . . . is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well." *Id.*, cmt. a.

In the United States, whether an exercise of jurisdiction would be reasonable depends, in turn, on a number of factors: (1) the extent to which the activity being regulated is linked to the territory of the regulating state; (2) whether the persons being regulated are linked to the regulating state by nationality, residence, or economic activity; (3) the extent to which other states have an interest in regulating, and do

regulate, the activity at issue; and (4) the likelihood of conflict with the regulation of another state. *Id.* § 403.

These limiting principles of U.S. law parallel and incorporate principles of international law and comity. Under international law, the limitations on the extent to which any single nation can extend its own jurisdiction are generally recognized as flowing from the sovereignty and equality of nations. *See, e.g.*, Ian Brownlie, *Principles of Public International Law*, 287 (6th ed. 2003) ("principal corollaries" of sovereignty and equality include respect of "the area of exclusive jurisdiction of other states").

Territoriality is universally recognized in international law as a primary ground for asserting jurisdiction. *See id.* at 297 ("The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial."). International law has developed a number of additional grounds for asserting jurisdiction that are based on the need for a "substantial and genuine" connection to the nation asserting jurisdiction. *See id.* at 297; John H. Currie, *Public International Law* 308 (2001) ("when viewed as a whole, state practice discloses . . . the requirement of a genuine and effective link justifying extension of a state's prescriptive jurisdiction to any particular person or transaction.").

The courts of Canada, like those of other nations, have also recognized these principles. "Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe." *Hunt v. T & N p.l.c.*, [1993] S.C.R. 289, 322 (Can.). The Supreme Court of Canada also has recognized restrictions on "the exercise of jurisdiction over extraterritorial and transnational transactions," and that a Canadian court may exercise jurisdiction "only if it has a real and substantial connection with the subject matter."

Tolofson v. Jensen, [1994] S.C.R. 1022, 1049 (Can.) (internal quotation omitted). *See also*, *Morguard Invs.* (same); *Amchem Prods., Inc. v. British Columbia Workers' Comp. Board*, [1993] S.C.R. 897 (Can.) (same).

This internationally recognized principle of a "substantial and genuine connection" applied in the United States as "reasonableness" bears on the proper construction of statutes enacted by the United States. *See, e.g., McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21 (1963) (to avoid "international discord," National Labor Relations Act construed not to cover foreign ships employing foreign crews); *Aramco* (Civil Rights Act of 1964 construed to apply to U.S. employers employing U.S. citizens abroad). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 ("this and other courts have frequently recognized that . . . statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.") (Scalia, J., dissenting).

In the context of U.S. antitrust law, the principle that U.S. jurisdiction is necessarily limited was captured memorably by Judge Learned Hand in his admonition that the Congress did not intend to punish "all whom its courts can catch." *Alcoa*, 148 F.2d at 443 (2d Cir. 1945). In this seminal decision construing the extraterritorial reach of the Sherman Act, the court concluded that the Congress intended to punish only extraterritorial acts that were intended to have, and that did have, a substantial effect on the United States. The court expressly recognized that the Sherman Act must be construed in light of the fact that all nations necessarily must, in an interdependent world, limit their unilateral actions:

> [I]t is quite true that we are not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers. . . .

Id. Subsequent amendments to the Sherman Act have altered neither the force of those observations nor the principles on which they were based.

Consideration of the four factors applied by U.S. courts to determine the reasonableness of an exercise of extraterritorial jurisdiction makes clear that the broad application of Sherman Act jurisdiction that respondents propose is not defensible in the circumstances of this case. These factors relate to a nexus with U.S. territory, to a nexus with U.S. nationals, to other countries' interest in regulation, and to conflict with other countries' regulation. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 583-94 (1953) (considering, among other factors, place of harm, nationality of plaintiff, foreign law and adequacy of foreign remedies); *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383-84 (1959) (same).

(a) No Nexus To the Territory of the United States. The territoriality principle does not support jurisdiction in this case. The transactions on which respondents base their claims under the Sherman Act occurred wholly outside of the territory of the United States. From the perspective of the nations in which the transactions took place, the transactions occurred within their territory and were transactions in their domestic or foreign commerce; by contrast, from the perspective of the United States, the transactions were wholly outside of its territory and wholly within the territory of one or more foreign nations.

Moreover, the transactions giving rise to respondents' claims had no effect on United States commerce. No effects on U.S. commerce or on U.S. foreign commerce – direct, substantial, foreseeable, intended, or otherwise – were alleged to have resulted from the transactions at issue here.

Pet. App. 7a (respondents are "persons injured abroad in transactions otherwise unconnected with the United States"). The only tie alleged to United States is that the sellers' global cartel (in contrast to the specific transactions upon which respondents' causes of action are based) had an effect on United States commerce. Thus, the facts here are fundamentally different from those of *Hartford Fire* and the cases cited therein, in which the transactions were intended to, and did, affect commerce in the United States. 506 U.S. at 776-77.

(b) Insufficient Nexus To Nationals of the United States. None of the respondents is a U.S. national. The respondents are foreign entities domiciled in various countries outside of the United States. The respondents' injuries, the payment of inflated prices for their bulk vitamins purchases, occurred outside the United States. Pet. App. 6a. The various foreign countries in which respondents are domiciled and in which the transactions (and their injuries) occurred have a greater interest in the transactions at issue in this case that the United States. Accordingly, there is no basis for jurisdiction on the basis of nationality. *See, e.g., Romero*, 358 U.S. at 383-84 (noting relative lack of nationality connections to United States); *Lauritzen*, 345 U.S. at 586-88 (same); Restatement § 403(2)(b) & (g) (reasonableness of jurisdiction determined in part by connections to regulating state and to other states).

(c) Canada and Other Nations Have a Strong Interest in Regulating, and Do Regulate, the Type of Activity on Which Respondents' Claims are Based. Canada's strong interest in regulating anticompetitive behavior is evidenced by competition laws that have been in place for more than a century, vigorous enforcement of those laws, the imposition of punitive sanctions against corporations and individual corporate officials for violations of those laws, and civil remedies available to persons injured by cartel or anti-

competitive behavior. Underlying Canada's comprehensive competition laws is a policy commitment to provide all Canadians with competitive market prices and product choices.

In 1889, the Canadian Parliament passed "An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade," S.C. 1889, ch. 41, the first antitrust law among industrialized nations. Canada's law was in place even before the United States enacted the Sherman Act in 1890. 1 Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* 10 (5th ed. 1996).

An important element of effective enforcement of Canada's antitrust laws has been its leniency and amnesty programs. Canada has granted various forms of leniency to cooperating antitrust conspirators since 1991 and the Commissioner of Competition, in consultation with the Attorney General of Canada, adopted a formal amnesty program in 2000. *See* Government of Canada, Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (2000).[3] Canada's immunity program, which mirrors the amnesty program instituted by the United States, is used by the Competition Bureau of Canada (the "Bureau") to detect, investigate, and prosecute anticompetitive behavior. Canada's immunity program requires that, when possible, the party seeking immunity will make restitution for the illegal activity.

By offering entities that have violated Canada's Competition Act an opportunity to obtain immunity or leniency in exchange for providing information that can be used to prosecute the other parties engaged in the unlawful anticompetitive conduct, the Canadian immunity program provides a valuable incentive that facilitates enforcement of

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[3] *Available at* http://strategis.ic.gc.ca/pics/ct/immunitye.pdf.

the Competition Act by enabling the Bureau to obtain evidence voluntarily that otherwise might never have come to light. Harry Chandler, *Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada* (Mar. 10, 1994).[4]

The Bureau's program of leniency and immunity has been, in the words of Canada's former Commissioner of Competition, "a singular success" in the Bureau's efforts to uncover and prosecute cartels operating in Canada. Konrad von Finckenstein, *Address to Canadian Bar Association,* Competition Law Section Annual Meeting (Oct. 3, 2002).[5] Amnesty has been particularly successful with respect to international conspiracies when the agreements and evidence of the conspiracy are located outside of Canada and when international cooperation between Canada and foreign nations is necessary. For example, there were 51 prosecutions between 1980 and 2000 under section 45 of the Competition Act with fines totalling approximately Cdn $158 million, mostly in respect of international cartel behavior. Peter Franklyn & Paul Winton, *An Overview of the Immunity Program Under Canada's Competition Act*, Presentation to the American Bar Association Section of International Law and Practice (Fall Meeting, Brussels) at 12-14 (Oct. 17, 2003). Since the immunity program was officially implemented in 1999/2000, the courts have levied more than Cdn $130 million in fines in relation to offences

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4 *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01432e.html.

5 *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02709e.html.

under the Competition Act. Competition Bureau of Canada, *Penalties Imposed by the Courts* (Dec. 10, 2003).[6]

Canada's enforcement of its competition laws has been consistent with principles adopted by the Organization for Economic Co-operation and Development ("OECD"), and with the practice of a number of countries, including the United States, that have developed and implemented leniency programs as part of their cartel enforcement program. The OECD jurisdictions that have adopted leniency programs include Australia, France, Germany, Hungary, Ireland, South Korea, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the European Union. OECD, *Policy Brief: Using Leniency to Fight Hard Core Cartels* at 2 (Sept. 2001).[7]

(d) The Assertion of Jurisdiction that Respondents Urge Would Conflict With Antitrust Regulation by Canada. Exercising jurisdiction in this or similar cases would conflict with Canada's enforcement of its own antitrust regime.

First, upholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program. The administration of that program succeeds because of the incentive it gives cartel members to report their illegal activity and to cooperate with authorities. Under the jurisdictional reach that respondents advocate, a company that has violated the Competition Act in Canada would have less incentive to make a voluntary disclosure to Canadian authorities, because criminal immunity from Canadian authorities would come at the increased cost of punitive treble damages under U.S. law for

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6 *Available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/h_ct01709e.html#s-45.

7 *Available at* http://www.oecd.org/dataoecd/60/8/21554908.pdf.

its worldwide transactions. This threat of treble damages may make it too expensive for many cartel members to cooperate, which potentially risks a significant diminution in the effectiveness of the disclosure and immunity program upon which Canadian antitrust enforcement has successfully relied.

United States jurisdiction under the facts of this case would also conflict with Canadian antitrust regulation by undermining Canada's national policy of allowing civil recourse only up to the amount of actual damages, plus costs. *See generally*, the Competition Act, § 36 (civil remedies). The contrary, and unique, policy of the United States permitting the recovery of treble damages in civil antitrust actions likely would prove powerfully attractive to most Canadian plaintiffs injured by anti-competitive behavior in Canada. Treble damages would be available in the United States so long as any part of the cartel affected the United States. Accordingly, the attractiveness of the treble damages remedy would supersede the national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages. When an additional U.S. remedy conflicts with such a "comprehensive" policy adopted by another country, jurisdiction is unreasonable. *See Lauritzen,* 345 U.S. at 575.

The conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behavior by Canadian companies in Canada that injured Canadian nationals. A sovereign's interests are most immediately involved in enforcing its own laws against its own nationals for actions within its own territory. Yet if the cartel behavior had some unrelated effect on U.S. commerce, the respondents' proposed construction of the FTAIA would result in U.S. jurisdiction over foreign

nationals and wholly foreign transactions. In comparison to Canada's interests, the interests of the United States would be meager, and the effect of upholding U.S. jurisdiction would be to make the courts of the United States the *de facto* forum of choice for any plaintiff anywhere in the world who could identify some effect of the anticompetitive behavior on U.S. commerce.

Moreover, agreements entered into by competitors who collectively lack market power in Canada are legal because the requisite "undue" economic effect is not present. Nevertheless, if the interpretation of the FTAIA of the court below is adopted, Canadian plaintiffs could commence actions in U.S. courts against Canadian defendants based on lawful transactions in Canada so long as the agreement affects an unrelated party in the United States. Such a sweeping jurisdictional reach would call into question this Court's dictum in *Matsushita* that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

In this case, the cartel through which the respondents vicariously attempt to establish U.S. jurisdiction has already been the subject of enforcement actions by Canadian enforcement authorities. Indeed, Canada has imposed record fines on the participants in the cartel, one of whom is a Canadian resident, for their Canadian transactions and transgressions of Canadian law. Franklyn & Winton, *supra.*

An assertion of U.S. antitrust jurisdiction would undercut Canada's immunity program, would negate the "undueness" element of the offence in Canada, and would effectively supersede Canada's policy on civil recovery. This surely would "conflict with the regulation" of competition by Canada. Accordingly, the assertion of such jurisdiction would be unreasonable under United States law.

Restatement § 403(2)(h) ("the likelihood of conflict with regulation by another state").

C. Under Principles of Comity, U.S. Courts Should Not Exercise Jurisdiction in the Circumstances of this Case.

Even if this Court were to embrace the construction of the FTAIA proffered by respondents, this Court should nevertheless hold that it would be unreasonable for U.S. courts to exercise such jurisdiction. In *Hartford Fire*, this Court raised, but declined to answer, the question whether a court should "decline to exercise [Sherman Act] jurisdiction on grounds of international comity." 509 U.S. at 798 (*citing* H.R. Rep. No. 97-686, at 13 (1982) (FTAIA "would have no effect on the court['s] ability to employ notions of comity . . . or otherwise take account of the international character of the transaction.")); *see also id.* at 797 n.24 ("concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.") (*citing Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979)). In *Mannington Mills*, the Third Circuit held that even when a court does have jurisdiction under the Sherman Act, "foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." 595 F.2d at 1296.

In *Romero*, this Court declined to exercise extraterritorial jurisdiction under the Jones Act even though the claim undoubtedly arose under the U.S. statute. 358 U.S. at 383. This Court applied a "conflict-of-law" analysis, noting that it would "move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations." *Id.*

Moreover, as noted above, the four "reasonableness" factors all would counsel for an invocation of comity to decline jurisdiction in the absence of transactional ties to, or effects on, the United States.

II. MUTUAL, MULTINATIONAL COOPERATION AND ACCOMMODATION ARE ESSENTIAL TO EFFECTIVE ANTITRUST ENFORCEMENT

Canada and the United States share the world's largest trading relationship with approximately US$1.2 billion in goods crossing the border each day. *See* Canada Department of Foreign Affairs and International Trade, Trade and Economic Analysis Division, *Fourth Annual Report on Canada's State of Trade* (May 2003).[8] The United States is the destination of more that 81% of Canadian exports and the source of 70% of its imports. *Id.* The market for U.S. goods in Canada is larger than the market for such goods in the fifteen nations of the European Union combined and more than three times as large as the Japanese market for U.S. goods. U.S. Dep't of Commerce, Bureau of Economic Analysis, *U.S. Int'l Trade in Goods and Services*, Ex. 14 (Jan. 14, 2004).[9] Through November 2003, Canada took in almost 24% of all U.S. exports for the year. *Id.*

With this singular commercial relationship comes a commensurate need for mutual cooperation and reliance in antitrust enforcement. The efficacy of such cooperation could be threatened by the unilateral exercise of jurisdiction by the United States under the facts of this case.

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[8] *Available at* http://www.dfait-maeci.gc.ca/eet/trade/sot_2003/SOT_2003-en.asp.

[9] *Available at* http://www.bea.gov/bea/newsrel/trad1103.xls.

Canada and the United States share a long history of cooperation in investigating and prosecuting international cartels dating back to the early 1900's when they jointly investigated and prosecuted a cartel involving newsprint that operated in both countries. *See* George N. Addy, *International Harmonization Efforts and Enforcement Cooperation: The Canadian Experience* (Mar. 1994).[10] More recently, an Assistant Attorney General of the Antitrust Division characterized the United States' "cooperative relationship with Canada" in civil and criminal antitrust enforcement as "central to the success we and our sister agencies have enjoyed" in a number of investigations, which demonstrates the "benefits of cooperation to both cooperating countries." Anne K. Bingaman, *International Cooperation and the Future of U.S. Antitrust Enforcement* (May 16, 1996).[11]

The commitment of the United States and Canada to mutual cooperation in antitrust enforcement also is advanced by multilateral agreements such as the North American Free Trade Agreement, as well as in a singular series of bilateral agreements. The 1959 Joint Statement Concerning Cooperation in Antitrust Matters (the Fulton-Rogers Agreement), for example, created a formal consultative procedure for competitive matters of mutual concern. This commitment to joint cooperation was reinforced by a Memorandum of Understanding in 1969, and was further advanced in the Memorandum of Understanding as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Law, which was

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[10] *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01394e.html.

[11] *Available at* http://www.usdoj.gov/atr/public/speeches/96-05-16.htm.

adopted in 1984. Under this agreement, the antitrust authorities in both countries are required to notify the other whenever antitrust investigations, proceedings, or actions affect or could affect the national interests of the other or would necessitate a search for information in the other.

The 1990 Mutual Legal Assistance Treaty between the United States and Canada allows enforcement authorities in either country to invoke assistance for compulsory process in the other country for criminal matters, including criminal antitrust matters. In 1995, both countries signed the U.S./Canada Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (the "U.S./Canada Marketing Agreement"), which provides for notification to the other when antitrust enforcement activities "may affect important interests of the other" or may involve obtaining information from the other country.

The U.S./Canada Marketing Agreement endorses the concept of "positive comity," under which one country agrees to consider the other country's request to initiate or expand an antitrust investigation. Accordingly, the Antitrust Guidelines for International Operations adopted by the Antitrust Division of the U.S. Department of Justice require the agency to consider whether "any significant interests of foreign nations would in fact be affected by such exercise of jurisdiction," and to consider deferring exercise of that jurisdiction when there would be such an effect. 53 Fed. Reg. 21584, 21595 (June 8, 1988).

In recent years the OECD has encouraged many nations to adopt comprehensive antitrust enforcement programs and to expand their cooperative efforts. *See generally,* OECD, *Hard Core Cartels* (2000).[12] These efforts largely have been successful:

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[12] *Available at* http://www.oecd.org/dataoecd/39/63/2752129.pdf.

> Japan recently entered into its first co-operation agreement, with the US, and the latter has also entered into recent co-operation agreements with Brazil and Israel. . . . Given the benefits that international co-operation has had when it has been used, it seems likely that unwarranted obstacles to such co-operation will increasingly be viewed as harmful both to the countries that impose them and to the global economy.

Id. at 28.

Further, the OECD specifically urges its members states to apply principles of comity with respect to cartels:

> Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles . . . and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (May 14, 1998).[13]

But the interpretation of the FTAIA by the court below appears likely to remove the incentives of other foreign jurisdictions to implement comprehensive antitrust enforcement regimes and to expand their cooperative efforts for the same reasons that the decision adversely affects Canada's interests. Thus, the unilateral assertion of

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[13] *Available at* http://strategis.ic.gc.ca/pics/ct/1998oecd_hccrec.pdf.

jurisdiction by the United States would, ultimately, impair the interests of the United States in effective mutual cooperation and enforcement.

Extending jurisdiction in this case without consideration of the reasonableness of exercising the courts' powers under the principles of international law articulated above would elevate the courts of the United States to an unwarranted and unintended position of preeminence in international antitrust regulation and enforcement, and to a position of appearing indifferent to the impact of the exercise of their powers on other countries. The United States should not, and the Government of Canada would not, welcome such a result.

CONCLUSION

Construing the FTAIA to cover a dispute between foreign parties over transactions wholly in foreign countries would be unreasonable. Such a construction would be inconsistent with U.S. law and principles of international law and comity. In addition, a decision by U.S. courts to exercise jurisdiction under such circumstances would be inconsistent with established principles of international comity.

The unreasonableness of the result that respondents espouse also stems from the practical consequences that such broad extraterritorial action would have on antitrust policies and enforcement efforts of other countries. It would frustrate international interests in effective mutual cooperation in antitrust deterrence and enforcement that increasingly is essential in an economically interconnected family of nations.

Accordingly, the Government of Canada respectfully submits that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, IRELAND AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. EXPANDING THE JURISDICTION OF UNITED STATES COURTS TO COVER FOREIGN INJURIES TO FOREIGN PLAINTIFFS COULD INTERFERE WITH GLOBAL ANTITRUST ENFORCEMENT	7
A. Cooperation And Coordination Are Essential To Effective Global Antitrust Enforcement	8
B. Expanding United States Court Jurisdiction Could Undermine Leniency Programs	9
C. An Expansive Interpretation Of United States Court Jurisdiction Would Shift Most Private Claims To United States Courts	13
II. EXTENDING PRIVATE ANTITRUST LITIGATION OVER FOREIGN ANTITRUST INJURIES RISKS GENERATING SERIOUS CONFLICTS	15
III. THE INTERPRETATION OF UNITED STATES ANTITRUST LAW SHOULD BE CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

Capital Currency Exch., N.V: v. Nat'l Westminster Bank, 155 F.3d 603 (2d Cir. 1998) 4
Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom., Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) 14
EEOC v. Arabian Amer. Oil Co., 499 U.S. 244 (1991) 20
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 19, 20
In re Ocean Shipping Antitrust Litig., 500 F. Supp. 1235 (S.D.N.Y. 1980) 17
In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980) 16, 17
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Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) 21
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 19
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc, 473 U.S. 614 (1986) 22
Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 7, 19
Sosa v. Alvarez-Machain (U.S. S.Ct. No. 03-339) .. 2
The Antelope, 23 U.S. 66 (1825) 19

TABLE OF AUTHORITIES—Continued

Page

Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976), *on remand*, 574 F.Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) 21, 22
United States v. Aluminum Co. of Amer., 148 F.2d 416 (2d Cir. 1945) 20-21
Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 124 S.Ct. 872 (2004) 14

FOREIGN CASES

Boeing/McDonnell Douglas, EC Case; No. IV/M.877 (July 30, 1997) 16
Courage v. Crehan, [2001] ECR I-6297 4
Garden Cottage Foods, Ltd v. Milk Marketing Bd., [1984] A.C. 130 (1983) 3 CMLR 43 (UK House of Lords) 3
Gencor Ltd. v. Commission of the European Communities, Case T-102/96, 1999 E.C.R. II-753 19
General Elec./Honeywell, EC Case No. COMP/M.2220 (July 3, 2001) 15
In re Wood Pulp Cartel, [1985] CMR 474, *aff'd sub. nom., A. Ahlstrom Osakeyhito v. Comm'n*, [1988] 4 CMLR 901 (1988) 3
Provimi Ltd. v. Aventis Animal Nutrition S.A., [2003] E.C.C. 29 4
Rio Tinto Zinc Corp. v. Westinghouse, [1978] W.L.R. (H.L. 1977) 16
Smith Kline & French Labs Ltd. v. Bloch, [1983] 1 W.L.R. 730 (C.A. 1982) 14

TABLE OF AUTHORITIES—Continued

UNITED STATES STATUTES AND AGREEMENTS	Page
Alien Tort Statute, 28 U.S.C. §1350	2
Clayton Act §4, 15 U.S.C. §15	13
Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a	*passim*
Sherman Act §§1, 2, 15 U.S.C. §§1, 2	3
Agreement Between the Government of the U.S. and the Commission of the E.C. Regarding the Application of Their Competition Laws (Sept. 23, 1991) (available at http://www.usdoj.gov/atr/public/international/docs/ec.htm) as modified by the *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws* (June 4, 1998) (available at http://www.usdoj.gov/atr/public/international/docs/1781.htm)	9, 20
Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Amending the Treaty on Mutual Legal Assistance in Criminal Matters done at Washington on 6 January 1994 (May 1, 2001) (available at http://195.166.119.99/Files/kfile/CM5375.pdf)	9
FOREIGN STATUTES AND TREATIES	
British Protection of Trading Interests Act of 1980, 1980 ch. 11	17-18
English Statute of Monopolies of 1623, 21 Jam. c.3	14
Ireland Competition Act, 2002, §§4, 5, 14	5

TABLE OF AUTHORITIES—Continued

	Page
Netherlands Competition Act, Statute Book 1977, 242, art. 6	5
Treaty of Amsterdam, Articles 81, 82	3, 4
United Kingdom Competition Act of 1998, 1998 ch. 41	4
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MISCELLANEOUS	
ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002)	13
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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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IN THE

Supreme Court of the United States

No. 03-724

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,
Petitioners,

v.

EMPAGRAN, S.A., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, IRELAND AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

The Governments of the United Kingdom, Ireland and the Netherlands ("the Governments") are committed to the rule of

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. Counsel of record for each of the parties has given written consent to the filing of this *amici curiae* brief and such consents have been submitted to the Clerk. S. Ct. R. 37.3(a).

law as essential to a global trading and investment system and to an international civil society. However, the Governments in general are opposed to assertions of extraterritorial jurisdiction in private antitrust cases where foreign claimants seek to recover from foreign defendants solely for foreign injuries not incurred in the country in which the private suit is filed. Such litigation contravenes basic principles of international law and may impede trade and investment as well as undermine public enforcement by the Governments of their competition laws. It also would interfere with a sovereign nation's right to regulate conduct within its territory.

The competition laws of the United Kingdom, Ireland, the Netherlands, and the European Community (of which we are member states) outlaw most horizontal cartels and provide access to an independent judiciary for litigants. The Governments support vigorous enforcement of both foreign and domestic competition laws and authorize both public and private claims. Their enforcement systems differ, but the general approach to private claims reflects carefully considered decisions about the best methods for detecting and deterring cartels and compensating victims.

The Governments are concerned that the Court of Appeals' expansive reading of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a ("FTAIA"), will undermine their respective choices regarding the proper balance of public and private enforcement. Thus, they have a substantial interest in this litigation and in the proper interpretation of the FTAIA.[2]

[2] The United Kingdom, Australia and Switzerland also submitted their views on extraterritorial jurisdiction of U.S. courts under the Alien Tort Statute, 28 U.S.C. §1350, in an *amicus* brief in *Sosa v. Alvarez-Machain* (U.S. S. Ct. No. 03-339) (filed January 23, 2004).

STATEMENT

While the competition laws applicable in Ireland, the Netherlands and the United Kingdom vary by country, they uniformly condemn most horizontal cartels, provide for enforcement by a public authority and grant cartel victims a right to compensation. All three states are members of the European Union ("EU"), one of the pillars of which is the European Community ("EC"). EC competition law applies to cases affecting trade between member states and takes precedence over domestic laws.

Article 81 of the EC treaty[3] regulates "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Such agreements are prohibited except in circumstances where there are countervailing benefits to consumers. Article 82 of the EC treaty prohibits abuse by firms in dominant positions within the common market or in a substantial part of it. In practice these prohibitions produce controls that are broadly comparable in scope to the provisions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 & 2, although there are differences of detail (e.g., there is no *per se* or rule of reason test). A private person or enterprise can sue to enforce either Article under procedures authorized by member states. *See Garden Cottage Foods, Ltd v. Milk Marketing Bd.* [1984] A.C. 130 (1983) 3 CMLR 43 (UK House of Lords). EC law is territorially-based and thus applies only to injuries arising from conduct or transactions implemented in the Community. *See In re Wood Pulp Cartel* [1985] CMR 474, *aff'd sub. nom., A. Ahlstrom Osakeyhito v. Comm'n*, [1988] 4 CMLR 901 (1988).

[3] The original treaty numbers regarding competition law (Articles 85 & 86) were changed by the Treaty of Amsterdam to 81 & 82.

The United Kingdom's domestic competition laws, which have been substantially revised in the past six years, apply to cases affecting trade within the United Kingdom and are designed to protect its economy and its consumers against competition abuses. The Competition Act of 1998's provisions similar to EC Articles 81 and 82 "appl[y] only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom." 1998 ch. 41 §2(3). Companies may be fined heavily; individuals are subject to criminal sanctions. Enterprise Act of 2002, 2002 ch. 40 §188. The criminal cartel offense applies only to conduct or implementation in the United Kingdom. *Id.* at 190(3).

An action for private damages can be brought in the United Kingdom courts or through a simplified procedure in the Competition Appeal Tribunal. *See id.* at §18 (incorporating Competition Act §47A); *see also Courage v. Crehan*, [2001] ECR I-6297; *Capital Currency Exch., N.V. v. Nat'l Westminster Bank*, 155 F.3d 603, 610 (2d Cir. 1998) (infringements of Articles 81 and 82 "give rise to an action for damages" in the UK). Persons injured by the vitamin cartel in the United Kingdom were allowed to sue British subsidiaries in the UK courts for private damages. *See Provimi Ltd. v. Aventis Animal Nutrition S.A.*, [2003] E.C.C. 29. In such proceedings, costs can be awarded at the general discretion of the courts or Tribunal.[4] The UK competition laws also allow for special procedures for class actions brought on behalf of consumers with their consent.

[4] The competition laws of the United Kingdom prohibiting cartel agreements are enforced by the Office of Fair Trading (OFT). Between April 1, 2002 and March 31, 2003, the OFT "opened 1,141 complaint cases (including 31 cartel cases) under the Competition Act of 1998. . . . [and] launched an investigation . . . in 54 cases." Office of Fair Trading, *Annual Report and Resource Accounts* 2002-03, at 56 (available at http://www.oft.gov.uk/News/Annual+report/2002.htm). The OFT imposed total penalties of £35.8 million. *Id.* In addition, 414 mergers and merger proposals were reviewed by the OFT during this reporting period. *Id.* at 64.

Ireland's competition regime similarly condemns concerted and unilateral anticompetitive conduct. *See* Ireland Competition Act, 2002, §§4 & 5. It proscribes cartel conduct where either the object or effect of the restraint prevents, restricts or distorts competition in the state. "[C]artel enforcement is a central mission for the Competition Law Authority" and is subject to criminal sanctions. *See* Terry Calvani, *Enforcement of Cartel Law in Ireland*, 2003 Fordham Corp. Law Inst. __ (Barry Hawk ed. forthcoming 2004). Fines of up to €4 million or ten percent of annual turnover may be imposed on companies and persons may be sentenced up to five years imprisonment. In addition to public enforcement, a private right of action allows injured parties to seek both equitable relief and compensatory damages. Ireland Competition Act at §14. Class actions are not permitted under Irish law.[5]

The Netherlands' National Competition Authority ("NCA") vigorously enforces its competition laws.[6] The Competition Act prohibits bilateral conduct that has as its "object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof." Competition Act, Statute Book 1977, 242, art. 6. Abuse of a dominant position is similarly prohibited. *Id.* art. 24. Private damage cases may be brought in Civil Court which will accept the decision of the NCA as legal proof of the anticompetitive behavior, limiting the civil case to a determination of damages.

[5] Criminal penalties were substantially increased in 2002 as were the Competition Authority's investigatory powers. For discussion of the evolution of competition policy in Ireland, *see* John Fingleton, *Political Economy In Ireland*, 2001 Fordham Corp. Law Inst. 569 (Barry Hawk ed. 2002).

[6] Fines for 2002 totaled €99.6 million, higher than any other country in proportion to its Gross Domestic Product. Annual Rep. of the Nma and DTe 13 (2002) (available at www.nmanet.nl/en/service_and_connect/downloaden/). Its competition enforcement budget is the third highest (after New Zealand and Australia) measured on the same basis.

SUMMARY OF ARGUMENT

The decision below would permit United States courts to hear private claims by foreign plaintiffs seeking redress for antitrust injuries allegedly suffered by them in Australia, Ecuador, Panama and Ukraine from sales of vitamins there and in other foreign countries by foreign sellers. These injuries do not arise from any contacts or relationships with plaintiffs in the United States. The argument that treble damages for foreign injuries can be recovered in a United States court because the conduct at issue also resulted in injuries to *other* parties who made purchases in the United States is a complete *non sequitur*. These unrelated injuries were the basis for other private actions in United States courts and have been fully compensated. In addition, such a rule potentially would permit virtually any significant commercial transaction to be the basis for private United States treble damage claims, usurping the enforcement systems of other countries to United States private actions.

This decision would provide substantial encouragement for widespread forum shopping, might impede competition law enforcement programs in the United Kingdom, Ireland and the Netherlands as well as the European Community, and would undermine respect for national sovereignty. The court of appeals' ruling has the potential for generating needless friction between foreign and United States legal systems and could lead to less, not more, cooperation and coordination of competition laws by all nations. It would wrongly expand the extraterritorial reach of the United States antitrust laws beyond this Court's or, to our knowledge, any foreign court's exercise of jurisdiction. International law principles recognize that a nation may prescribe laws and adjudicate claims beyond its own territory only where its assertion of jurisdiction does not infringe the rights of other nations to determine the law applicable to conduct within their own territories.

Ironically, the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. §6a ("FTAIA"), on which the disputed jurisdiction relies, was adopted to limit the antitrust jurisdiction of United States courts over private claims to those based on antitrust injuries suffered from transactions in United States commerce. This narrower reading is more consistent with recognized canons of construction that statutes are to be interpreted to avoid conflict with international law and the law of other states. *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

ARGUMENT

The United Kingdom, Ireland and the Netherlands as well as the European Community vigorously enforce their competition laws and reserve their harshest penalties for domestic and international horizontal cartels which fix prices, allocate markets, restrict output, and rig bids.[7] These enforcement systems rely on international coordination and continued respect for the values and judgments reflected in each nation's processes.

I. EXPANDING THE JURISDICTION OF UNITED STATES COURTS TO COVER FOREIGN INJURIES TO FOREIGN PLAINTIFFS COULD INTERFERE WITH GLOBAL ANTITRUST ENFORCEMENT

Expanding the antitrust jurisdiction of United States courts to permit private treble damage claims for injuries to foreign plaintiffs for conduct outside the United States—where those

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[7] Hoffman LaRoche, for example, was fined €462 million for its role in the eight vitamin cartels. Mario Monti, European Commissioner in charge of Competition Policy, *The Fight Against Cartels* (Sept. 11, 2002) (speech presented at EMAC and available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/384|0|AGED&lg=EN&type=PDF).

injuries have no effect on United States commerce—radically departs from current practices. It could impair rather than enhance public enforcement by undermining other countries' ability to enforce their competition laws.

A. Cooperation And Coordination Are Essential To Effective Global Antitrust Enforcement

Effective antitrust enforcement in an increasingly global economy depends on close governmental cooperation and coordination as well as respect for the decisions of other nations. Neither commercial transactions nor anticompetitive behavior by private firms is constrained by national boundaries. Antitrust enforcement officials thus place a high priority on closely knit international investigations.[8]

Formalized international procedures for gathering information and prosecuting anticompetitive acts with transnational effects are growing. *See* Charles S. Stark, *International Cooperation in the Pursuit of Cartels*, 6 Geo. Mason L. Rev. 533 (1998). Seven countries (Australia, Brazil, Canada, Germany, Israel, Japan and Mexico) and the European Union have adopted memoranda of understanding with the United States[9] that allow agencies to assist each other, allocate enforcement responsibility, and commit each country not to infringe on the other's actions. The laws of the United Kingdom, Ireland and the Netherlands also permit

[8] *See* Mario Monti, *Competition Enforcement Reforms in the EU: Some Comments by the Reformer* (April 4, 2003) (speech presented at Georgetown University and available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/200|0|RAPID&lg=EN&display=); *accord* R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission* (May 16, 2003) ("Cooperation among antitrust authorities will remain an essential means of detecting and prosecuting international cartel activity.") (available at http://www.usdoj.gov/atr/public/speeches/201199.htm).

[9] These MOUs are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

their enforcement authorities, within certain limitations, to arrange for the exchange of information with other countries to assist their civil and criminal law investigations. For example, the U.K./U.S. Mutual Legal Assistance Treaty updated on May 1, 2001, provides that the United Kingdom will "offer assistance in respect of requests from the United States of America made pursuant to the Treaty for assistance in anti-trust and competition law investigations." *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Amending the Treaty on Mutual Legal Assistance in Criminal Matters done at Washington on 6 January 1994* (May 1, 2001).[10] But such cooperation depends on reciprocal respect for the enforcement practices, priorities and jurisdiction of the other country.

B. Expanding United States Court Jurisdiction Could Undermine Leniency Programs

Price fixing and other cartels are elusive targets despite cooperation and coordination among national or regional enforcement authorities. Cartels can generate enormous profits; they operate in secret because they are illegal; and severe penalties make voluntary disclosure by members of the cartel risky and perilous. These problems are compounded when the cartel operates in international commerce because evidence of the cartel is difficult to gather; procedures differ among countries; and the participants are scattered among several jurisdictions.

[10] Available at http://195.166.119.99/Files/kfile/CM5375.pdf. *See also Agreement Between the Government of the U.S. and the Commission of the E.C. Regarding the Application of Their Competition Laws* (Sept. 23, 1991) (available at http://www.usdoj.gov/atr/public/international/docs/ec.htm) as modified by the *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws* (June 4, 1998) (available at http://www.usdoj.gov/atr/public/international/docs/1781.htm).

Prior to the 1990's traditional tactics such as plea bargains had only limited success because cartels were not condemned by all countries and enforcement practices varied widely among countries. In addition, potential whistle-blowers were unwilling to reveal themselves without formal assurances of protection. *See generally* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 707-09 (2001).

To counteract this failure, competition enforcement authorities have developed leniency programs and cooperated on collecting evidence, offering amnesty and prosecuting cartels operating across borders. The United States Department of Justice formalized and expanded its corporate amnesty program in 1993 and established standards and procedures whereby companies and their employees could obtain immunity for being the first to reveal a conspiracy and for cooperating with the government in its prosecution of the other conspirators. *See* Scott D. Hammond, *Lessons Common to Detecting and Deterring Cartel Activity* (Sept. 12, 2000) (Remarks at the 3rd Nordic Competition Policy Conference).[11] The development of amnesty programs has grown, and the authorities in the United Kingdom, Ireland, the Netherlands and EC as well as other countries have adopted specific programs. *See* John Vickers, Chairman of the Office of Fair Trading, *Competition Economics* (December 4, 2003) (Royal Economic Society Annual Public Lecture); *Cartel Immunity Program*, Ireland Competition Authority (Dec. 2001); *Leniency Guidelines*, Netherlands Competition Authority (June 28, 2002); *European Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases*, OJ C45, at 3-5 (Feb. 19, 2002).[12]

[11] Available at http://www.usdoj.gov/atr/public/speeches/6487.htm.

[12] Mr. Vicker's speech is available at http://www.oft.gov.uk/News/Speeches+and+articles/2003/spe05-03.htm. The Irish program is available at www.tca.ie; the Netherlands program at www.nmanet.nl/nl/Wet_en_regelgeving/NMa_Richtsnoeren; the EC program at http://europa.eu.int/comm/competition/antitrust/leniency.

Typically, the leniency applicant can receive total or substantial immunity from criminal and civil antitrust penalties if it is the first to come forward with credible or material evidence of a cartel before the enforcement authority has knowledge of the cartel or has begun an investigation. The terms vary as each country assesses the proper mix of incentives and penalties. These programs are a deliberate effort to balance interests of disclosure, deterrence and punishment. *See* John Vickers, *supra* (the"carrot of leniency" creates "a potential competition—a race to the competition authorities—for those contemplating the illegally agreed suspension of price competition").[13] Private lawyers also report that in determining whether to seek leniency and provide evidence, companies specifically weigh the public fine and private damages exposure against the probability of detection. *See* Laura Carstensen & Shaun Goodman, *Cartel Regulation* (*United Kingdom*) ch. 22 at 100-01 (Global Comp. Rev. eds., 2001).

There is widespread concurrence that leniency programs have been "spectacularly successful." Terry Calvani, *supra* (also predicting that Ireland's "Immunity Programme" will "prove to be a most valuable arrow in the Authority's quiver"). They are the basis for a majority of cartel prosecutions by the United States. *See* Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 Am. Crim. L. Rev. 241, 270-71 (2003). The European Commission's experience is similar. *See* Mario Monti, *The Fight Against Cartels*,

[13] The OFT leniency policy can be found at http://www.oft.gov.uk/business/legal+powers/ca98+leniency. htm. Press releases which concern fines for cartels uncovered as a result of the OFT's leniency policy can be found at http://www.oft. gov.uk/news/press+releases/2003/pn+18-03.htm; http://www.oft.gov.uk/news/press+releases/2002/pn+06-02.htm.

supra (the "leniency scheme has proved a formidable tool for encouraging firms to cooperate").

The international convergence of amnesty programs has become effective because it is "much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure." James M. Griffin, *The Modern Leniency Program After Ten Years, A Summary Overview of the Antitrust Division's Criminal Enforcement Program* (Aug. 12, 2003).[14] The Governments, however, are concerned about any policy or action that would make the programs less attractive to whistle-blowers. Competition authorities in the United Kingdom, Ireland and the Netherlands have all concluded that the proposed expansion of United States jurisdiction over private treble damages claims could have an adverse effect on international cartel enforcement. Enforcement officials from Germany[15] and the United States agree.[16] The issue here is that participants in leniency programs receive no immunity from

[14] Presented at ABA Annual Meeting, available at http://www.usdoj.gov/atr/public/speeches/201477.htm.

[15] A former German Minister of the Economy has noted that "the Empagran decision jeopardizes the success of the corporate leniency program in Europe since the incentive to disclose information to the authorities voluntarily will be reduced if companies must fear private class actions in the United States brought by plaintiffs from all over the world." Otto Graf Lambsdorff, *Antitrust Law as a Regulatory Factor in a Globalized Market Economy*, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany (June 19, 2003).

[16] *See* Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* (Nov. 18, 2003) (exposure to massive judgments in United States courts that are based on foreign injuries to foreign plaintiffs will create "a major disincentive" to "companies who are contemplating exposing cartel activity") (available at http://www.usdoj.gov/atr/public/speeches/201509.htm).

private damage actions. The expansion of United States jurisdiction and the accompanying availability of private treble damages may discourage potential whistle-blowers from providing evidence. When coming forward to expose secret agreements, they may be required to pay much greater damages than if the cartel otherwise would have not have been detected. If these forecasts are borne out by experience, cartel detection and deterrence will be diminished and consumer welfare will not be served.

C. An Expansive Interpretation of United States Court Jurisdiction Would Shift Most Private Claims To United States Courts

No other country has adopted the United States' unique "bounty hunter" approach that permits a private plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Clayton Act §4, 15 U.S.C. §15. The rules governing United States treble damage actions strongly favor private antitrust plaintiffs. They provide for generous class action certifications, broad discovery rules, virtually irrebutable presumptions of liability based on successful government actions, jury trials, subsidized contingency fee arrangements, asymmetrical rules on payment of attorneys' fees, and no contribution among defendants. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* ch. 10 (5th ed. 2002). The parliaments of the United Kingdom, Ireland and the Netherlands all recently enacted statutes allowing private actions for competition law violations, but have chosen to do so on a more limited basis.

Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants. Lord Denning best captured these

anomalies when he observed: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982).[17] Enlarging the prescriptive jurisdiction of the United States to provide a US antitrust remedy to foreign buyers with no cognizable US nexus will attract even more litigants and will increase the number of private antitrust claims filed in United States courts. There is no apparent justification for such a shift. While additional penalties could marginally increase deterrence, in this circumstance where international public enforcement is diminished, the likely effect may be to lessen overall detection. As this Court recently noted, "[j]udicial oversight under the Sherman Act" should not be expanded without clear direction from Congress lest it "distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by" private litigants. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 883 (2004).

Today, private antitrust actions authorized in the United Kingdom, Ireland and the Netherlands apply to a range of competition offenses and generally provide for only single damages.[18] The "loser pays" rule for attorneys fees applies in

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[17] *See also Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 427-28 (5th Cir. 2001), *cert. denied sub nom., Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002):

> [A]ny entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.

[18] The Irish statute and the law in the United Kingdom (except Scotland) allow for exemplary damages when appropriate.

As an historical aside, the original English Statute of Monopolies of 1623, 21 Jam. c.3:d, provided for treble damages and double costs

each country and competition law claims are heard either by judges or by administrative tribunals unlikely to be swayed by emotional appeals common to United States treble damages jury trials. *See, e.g.*, U.K. Dept. of Trade & Industry, *A World Class Competition Regime*, "Real Redress for Harmed Parties" ch. 8 at 47-48 (Government White Paper Cm 5233, July 2001) (noting that many U.S. commentators "view the number of private antitrust cases in the US as too high" particularly because of "unscrupulous lawyers . . . quick to file vexatious actions—attracted by the prospect of treble damages," and recommending "a system in the UK where private actions are less inhibited than at present—but in doing so . . . [being careful to] guard against the risks of the US system"). The absence of multiple damages and the different attorney fee authority in the United Kingdom, Ireland and the Netherlands are not simple oversights.

II. EXTENDING PRIVATE ANTITRUST LITIGATION OVER FOREIGN ANTITRUST INJURIES RISKS GENERATING SERIOUS CONFLICTS

Conflicting national antitrust policies can lead to public differences between nations, usually "because two or more nations with legitimate jurisdictional claims have required or permitted inconsistent conduct." Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 517 (1998). Policy differences may create public enforcement discrepancies, but these conflicts generally are best resolved directly by discourse between governments. *See, e.g., General Elec./ Honeywell*, EC Case No. COMP/M.2220 (July 3, 2001);

"wherein all and every such person and persons which shall be so hindered, grieved disturbed or disquieted . . . shall recover three times so much as the damages which he or they sustained . . . and double costs."

Boeing/McDonnell Douglas, EC Case; No. IV/M.877 (July 30, 1997).[19]

However, intense international disagreements also have arisen from private antitrust actions where such conflict is neither inevitable nor justified. Some well-known examples are:

- The *Uranium Cartel* case, *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980), involved private antitrust litigation in the United States and "outraged" foreign governments because the defendant foreign cartel supported by foreign governments responded to "anticompetitive" actions by the U.S. Government that had closed its market to foreign producers. The British House of Lords in turn denied discovery requests from U.S. courts. *See Rio Tinto Zinc Corp. v. Westinghouse*, [1978] W.L.R. (H.L. 1977).
- The *Ocean Shipping* cases involved unilateral attempts by the United States to alter long-established shipping practices setting uniform rates by shipping companies with the acquiescence and assistance of many governments. *E.g., In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235 (S.D.N.Y. 1980).

[19] As noted, our countries recognize that distinctive approaches and differing structures may in some instances result in inconsistent analyses and outcomes—and that some friction may be inevitable. But antitrust enforcement authorities both in Europe and the United States agree that the resolution of those differences should be through bilateral and multilateral discussion and cooperation, not the unilateral exercise of jurisdiction through private antitrust damage actions. *See* Mario Monti, *Competition Enforcement Reforms*, *supra* (outlining international enforcement cooperation and substantive multilateral initiatives such as the International Competition Network and the World Trade Organizations which are focusing on "outlawing hard-core cartels" and "international cooperation"); *see also* Deputy Assistant Attorney General Deborah Platt Majoras, *GE-Honeywell: The U.S. Decision* (Speech before the Antitrust Law Section, State Bar of Georgia, Nov. 29, 2001) (While the United States had "no power to change EU law, other than by persuasion, ... we believe it is important that we discuss this issue in depth . . . [in order for] a multilateral effort to develop a specific convergence agenda.") (available at http://www.usdoj.gov/atr/public/speeches/ 9893.htm).

- Other examples of disputed assertions of jurisdiction include *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (private U.S. action allowed contrary to permanent injunction issued by the U.K. Court of Appeal) and *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd o.g.*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (private action challenging OPEC oil pricing as a cartel).

These cases are noteworthy because the retaliation they generated against the United States has had significant long-standing effects. The private actions in the *Ocean Shipping* and *Uranium Cartel* cases caused several countries, including the United Kingdom, to enact statutes blocking discovery of documents and other information needed to prosecute foreign defendants. *See Restatement (Third) of Foreign Relations Law of the United States* §442, note 4 (1987) ("*Restatement (Third)*") (listing acts and their amendments). For example, the British Protection of Trading Interests Act of 1980, 1980 ch. 11, authorizes the Secretary of State for Trade and Industry to refuse to comply with laws or orders issued by "any overseas country" for regulating international trade if the laws "insofar as they apply or would apply to things done . . . outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom." *Id.* §1. This statute also restricts enforcement of treble damage judgments and allows both firms and persons conducting business in the United Kingdom to sue in the UK to "claw back" the penal portion of the foreign

judgment when they are forced to pay more than compensatory damages. *Id.* §§5-6

III. THE INTERPRETATION OF UNITED STATES ANTITRUST LAW SHOULD BE CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW

Finally, interpreting the FTAIA as authorizing United States court jurisdiction for all foreign injuries caused between foreign parties, whose only connection with the United States is that the defendant's conduct also had effects within the United States, is contrary to basic principles of international law regarding the allocation of jurisdiction between states. It is foundational that every sovereign state has an equal right to prescribe and enforce its law in accordance with the principles of international law regarding jurisdiction. *See* Vaughan Lowe "Jurisdiction" in *International Law* 329, 330 (Malcolm D. Evans ed. 2003) ("The legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they are concerned with the allocation between States . . . of competence to regulate daily life—that is, the competence to secure the *differences* that make each State a distinct society.")(emphasis in original); *see also Restatement* (*Third*) at §402(1).

In order to prevent conflicts between jurisdictions, international law has developed a number of widely accepted grounds upon which jurisdiction may be exercised. But there is one thread that runs through all. The common basis is

> a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the State exercising jurisdiction a sufficiently close connection to justify that State in regulating the matter and perhaps also to override any competing rights of other States.

Oppenheim's International Law 457-58 (Sir Robert Jennings & Sir Arthur Watts ed. 9th ed. 1992).

It follows, therefore, that the primary ground of jurisdiction which is universally recognized in international law is "territoriality." In accordance with this principle, a state may exercise its authority to prescribe and enforce its law over all persons and things within its territory. By contrast a state's authority to exercise jurisdiction extraterritorially is much more limited, the most widely recognized cases being that (i) a state's powers to extend the application of its law to its nationals wherever they may be (the "nationality principle"), and (ii) a state's power to protect its own vital security interests when threatened by the activities of foreigners outside its territory (the "protective principle"). In addition, (iii) the more controversial "effects doctrine" suggests that in certain circumstances a state may exercise jurisdiction over events that have a clear effect in its territory, even if the planning and execution takes place elsewhere. *See, e.g., Hartford Fire Ins. Co. v. California*, 475 U.S. 764, 796 (1993) ("*Hartford Fire*"); *Gencor Ltd. v. Commission of the European Communities*, Case T-102/96, 1999 E.C.R. II-753; *see generally, Restatement* (*Third*) at §402(1), 403(2).

These principles of international law have long been accepted in United States law. As this Court recognized in *The Antelope*, 23 U.S. 66, 122 (1825), "[n]o principle is more universally acknowledged, than the perfect equality of nations . . . . It results from this equality, that no one can rightfully impose a rule on another." *See also Laker Airways*, 731 F.2d at 921 (territoriality is "the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power"). Similarly, principles of international law inform the interpretation of statutes. *See The Charming Betsy*, 6 U.S. (2 Cranch) at 118 ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (quoted in *Hartford Fire*, 509 U.S. at 814-15 (1993)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This Court applied both the principle of territoriality and the canon of

construction recognizing the law of nations in *EEOC v. Arabian Amer. Oil Co.* 499 U.S. 244, 248 (1991). There the Court restated the "long-standing principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States' . . . [because this rule] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." (quoting *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949))

Given the potential for conflict which can arise from the exercise of extraterritorial jurisdiction, states have increasingly sought to establish procedures for cooperation and coordination when asserting jurisdiction. Examples include a series of Agreements between the European Communities and the United States of extraterritoriality in respect to antitrust law: (i) the Agreement of 23 September 1991 regarding the application of their competition laws, *supra*; (ii) the Exchange of Interpretive Letters of 31 May and 31 July 1995; and (iii) the Agreement of 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws, *supra*. *See also* Recommendation of the Council of the OECD of 28 July 1995 concerning Cooperation between Member Countries on Anti-Competitive Practices affecting International Trade.[20]

Similarly the *Restatement (Third)* interprets United States law as holding that even where there is a basis for extraterritorial jurisdiction in international law, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state *when the exercise of such jurisdiction is unreasonable*." *Id.* §403(1) (emphasis added). Thus, as *Alcoa* acknowledged,

[20] OECD Doc. No. C(95) 130 (Final) (1995) (available at http/www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html).

even when the United States antitrust laws are applied to foreign conduct with an effect in the United States, the assertion of jurisdiction over claims for foreign conduct must be consonant with "the limitations customarily observed by nations upon the exercise of their powers." *United States v. Aluminum Co. of Amer.*, 148 F.2d 416, 443 (2d Cir. 1945). This ruling was confirmed in *Hartford Fire* noting that United States antitrust prohibitions are limited to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796.

This limiting principle of reasonableness—absent from the decision below—has been deployed by the United States courts to minimize conflicts with the jurisdiction of other states. Most notably United States courts have invoked comity as means of resolving jurisdictional conflicts. *See Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976) *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). This approach seeks to balance the interests of the respective States in exercising jurisdiction to regulate the activities in question.

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the forseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors

> should identify the potential degree of conflict if American authority is asserted. . . . Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Timberlane, 549 F.2d at 614-15.

These factors were recognized in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*, 473 U.S. 614, 629 (1986), when this Court, in holding that the parties' choice of forum should be respected, expressly weighed "concerns of international comity, respect for capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." As the *Areeda Antitrust Treatise* concludes, jurisdiction over a transaction is given "to one country or another on the basis of its primary contacts, including . . . the relative strength of each state's policies bearing on the matter." Phillip E. Areeda and Herbert Hovenkamp, 1A *Antitrust Law* 276 (2d ed. 2000).

Applying the restraint required by the principle of reasonableness or the practices of comity to the present case, it is relevant that the plaintiffs' injuries occurred in foreign nations, that plaintiffs are foreign nationals, and that the effects of the plaintiffs' injuries were felt only in foreign lands. The only United States connection is that the defendants' conduct caused separate injuries to United States and foreign nationals in United States commerce—and that these latter injuries to private claimants have been subject to private class action claims in United States courts which were settled by substantial payments by the Defendants. Thus, the nexus between the United States and plaintiffs' claims is virtually nonexistent, while the relationship between plaintiffs and several foreign jurisdictions is immediate and substantial.

CONCLUSION

For the foregoing reasons, we urge that the jurisdiction of United States courts to hear private antitrust treble damage claims not be extended to apply to injuries that result from purely foreign commercial transactions and that the decision below be reversed.

Respectfully submitted,

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Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
PLAINTIFFS MAY NOT PURSUE SHERMAN ACT CLAIMS BASED ON INJURIES SUSTAINED IN DISCRETE TRANSACTIONS OCCURRING ENTIRELY OUTSIDE U.S. COMMERCE	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Associated Gen. Contractors of Cal., Inc. v. *California Council of Carpenters*, 459 U.S. 519 (1983) 7, 8, 10
Bank Austria AG v. *Sniado*, 352 F.3d 73 (2d Cir. 2003), *petition for cert. filed*, No. 03-1015 (U.S. Jan. 12, 2004) 1, 10
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 9
Cargill, Inc. v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986) 9
Den Norske Stats Oljeselskap As v. *HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) 7
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superceded by statute on other grounds*, *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244 (1994) 10
Empagran, S.A. v. *F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir.), *cert. granted*, 124 S. Ct. 966 (2003) (No. 03-724) 1
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 9
Kruman v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (No. 02-340) 1
Matsushita Elec. Indus. Corp. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 10
Sniado v. *Bank Austria AG*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001), *vacated*, 352 F.3d 73 (2d Cir. 2003) 5
United States v. *Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) 12
Warth v. *Seldin*, 422 U.S. 490 (1975) 9

TABLE OF AUTHORITIES – continued

STATUTE — Page

15 U.S.C. § 6a 3, 9

TREATY

Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444 8

OTHER AUTHORITY

2 ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002) 11

STATEMENT OF INTEREST OF *AMICI*[1]

In the decision under review, *Empagran, S.A.* v. *F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) ("*Empagran*"), the D.C. Circuit construed the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to authorize plaintiffs to bring suit under U.S. antitrust law to recover for injuries arising from the effects of anticompetitive conduct on purely foreign commerce, so long as the conduct that caused their injury also "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Empagran* Pet. App. 4a. In so doing, the D.C. Circuit noted its essential agreement with the position of the Second Circuit, as established in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (No. 02-340). *Empagran* Pet. App. 4a.

Amici are European Banks (the "European Banks" or "*Amici*") that are defendants in an antitrust action filed within the Second Circuit seeking recovery for alleged injuries occurring entirely outside U.S. commerce. After the district court dismissed the amended complaint for lack of subject matter jurisdiction, the Second Circuit vacated and remanded, in accord with the analysis in *Kruman* and *Empagran*. See *Bank Austria AG* v. *Sniado*, 352 F.3d 73 (2d Cir. 2003) ("*Sniado*"), *vacating* 174 F. Supp. 2d 159 (S.D.N.Y. 2001). On January 12, 2004, the European Banks filed a petition seeking certiorari review of the Second Circuit's decision (U.S. No. 03-1015). The petition raises precisely the legal

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

issues also raised in *Empagran* and requests that the Court hold the case pending its decision in *Empagran*.

Accordingly, *Amici* have strong particular and general interests in this case. First, the decision in *Empagran* will likely resolve potentially dispositive legal issues directly presented in the antitrust action brought against *Amici*. Second, as entities routinely engaged in transactions in commerce entirely foreign to the United States but that are governed by the antitrust regimes of individual European states and the European Union, *Amici* have a substantial interest in the correct construction of the FTAIA and in preventing yet another layer of competition regulation from being applied to those transactions.

Finally, the antitrust action against the European Banks usefully illuminates problematic aspects of the ruling below. The facts of the action vividly illustrate the absence of U.S. interest in the transactions alleged to have caused antitrust injury, the extraordinary difficulty of litigating claims involving purely foreign transactions and injuries, and the extent to which such litigation intrudes upon extant foreign regulation and damages international relationships.

For each of these reasons, *Amici* have a significant interest in presenting their views to this Court and believe that the Court may benefit from that presentation.

SUMMARY OF ARGUMENT

The European Banks file this brief not to repeat the arguments of petitioners, which they fully endorse. Instead, the Banks urge the Court to focus on the antitrust action filed against them which illustrates the damaging consequences of the FTAIA interpretation announced by the D.C. Circuit and the Second Circuit – consequences so harmful that they undermine the ruling below.

First, in the antitrust action in which the European Banks are defendants, an individual seeks to recover for injuries that he allegedly incurred in Europe while exchanging one European currency for another at European banks. Although plaintiff alleges the boilerplate conclusion of "direct, substantial, and reasonably foreseeable" effects on United States commerce, he has alleged no facts indicating that the alleged anticompetitive activity caused any effects in the United States. Nonetheless, to obtain the benefits of the U.S. forum and substantive U.S. law, including treble damages, the plaintiff is seeking discovery in the hope that he can support his bare allegation that there is such an effect. Virtually any conduct affecting only foreign commerce might motivate a plaintiff to allege an effect on someone in U.S. commerce. The D.C. and Second Circuits' rule, accordingly, will result in an avalanche of antitrust actions in U.S. district courts alleging purely foreign injuries.

Second, *Sniado* starkly illustrates the practical difficulties resulting from the D.C. and Second Circuits' interpretation of the FTAIA. The rule will result in burdensome and complex discovery, and any computation of damages will require an evaluation of the effects of conduct on numerous foreign markets (potentially including, in *Sniado*, the markets of Austria, Belgium, Germany, Italy and the Netherlands, but not the United States). Moreover, because injury to "someone" in U.S. commerce is a prerequisite to a Sherman Act claim, the court will often be required to conduct collateral litigation concerning whether a person or entity *not before the court* has suffered a "direct, substantial, and reasonably foreseeable" injury in U.S. commerce. 15 U.S.C. § 6a. As we show *infra*, this would be a peculiar practice in American jurisprudence generally and in antitrust law specifically.

Third, *Sniado* makes plain that the D.C. and Second Circuits' rule will interfere with foreign states' competition regulation and create tension with those nations. The

European Union and its individual member states have a well-developed competition law, and have indicated that they do not welcome the expansion of U.S. competition law coverage to purely European transactions (any more than the United States would welcome the expansion of European Union competition law to purely U.S. transactions). Both the U.S. government and foreign nations have further concluded that expanding U.S. competition law to purely foreign transactions will undermine international cooperation and deterrence efforts.

The D.C. and Second Circuits' interpretation of the FTAIA is contrary to the statutory language, legislative history and purpose of the FTAIA; it also generates damaging consequences that serve no discernable purpose. The decision below should be reversed.

ARGUMENT

PLAINTIFFS MAY NOT PURSUE SHERMAN ACT CLAIMS BASED ON INJURIES SUSTAINED IN DISCRETE TRANSACTIONS OCCURRING ENTIRELY OUTSIDE U.S. COMMERCE.

In *Empagran*, the D.C. Circuit held that five foreign companies located in Australia, Ecuador, Panama and the Ukraine could pursue an antitrust action under the Sherman Act to remedy injuries resulting solely from purchases made outside the United States that had no impact on U.S. commerce. The court held that so long as "someone, even if not the foreign plaintiff who is before the court," has an injury arising from an effect of the defendant's conduct on U.S. commerce, every foreign plaintiff with a claim arising from a purely foreign effect can sue as well. *Empagran* Pet. App. 4a, 19a-20a. In addition, the court held that the foreign plaintiffs had suffered "'antitrust injury'" and therefore had standing to bring their claim, stating that the arguments that persuaded

the court to find jurisdiction over the claims of foreign plaintiffs complaining of foreign injuries "similarly persuade us that the antitrust laws [are] intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at 36a. The *Empagran* defendants conceded that "someone" in the United States had been injured by the effect of their conduct on U.S. commerce; the court therefore allowed plaintiffs' claim to proceed.

In *Sniado*, the antitrust action filed against the European Banks, the Second Circuit's decision rested on the proposition that the antitrust jurisdiction of U.S. courts extends to the claim of an individual who was allegedly injured when he exchanged one European currency for another at certain European banks in Europe, and who suffered no injury in commerce either within the United States or between the United States and any other country.[2] See *Sniado* Pet. App. 10a. Like the D.C. Circuit, the Second Circuit ruled that a plaintiff may bring an antitrust action in a U.S. court against foreign defendants to redress alleged injuries suffered abroad that arose entirely out of foreign commerce (and that were unrelated to any effect the foreign conduct might have had on U.S. commerce).

In contrast to *Empagran*, the Second Circuit remanded the case to the district court to determine the foreign plaintiff's standing to bring suit. *Sniado* Pet. App. 8a. Moreover, in

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[2] The Second Circuit erroneously stated that Mr. Sniado "exchanged American dollars for Euro-currencies." 352 F.3d at 75. Rather, Mr. Sniado exchanged "'currencies that make up the Euro.'" *Sniado* v. *Bank Austria AG*, 174 F. Supp. 2d 159, 160 (S.D.N.Y. 2001) (quoting Am. Comp. ¶ 5). The plaintiff alleged in his amended complaint filed in 2001: "Until Euro banknotes and coins are introduced in 2002, the currencies of the countries making up the Euro-zone are still exchanged when traveling from one Euro-zone country to another." Am. Comp. ¶ 37. The Euro-zone countries at the relevant time were Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. *Id.* The Second Circuit's error in this regard had no efffect on its legal conclusion.

Sniado, the European Banks vigorously disputed the allegation that the alleged conduct had any "'direct, substantial, and reasonably foreseeable'" effects in the United States; indeed, the plaintiff had sought discovery on the issue of subject matter jurisdiction. *Id.* at 13a. Thus, the Second Circuit also ordered the district court to determine on remand whether the alleged conduct had any effect on U.S. commerce.

The briefs of petitioners and their other *amici* in *Empagran* show that the legal rule propounded by the D.C. Circuit and the Second Circuit is contrary to the best reading of the statutory language, to the legislative history and purpose of the FTAIA, to effective deterrence of antitrust violations and to international comity and cooperation in antitrust enforcement. The European Banks fully endorse these arguments and will not repeat them here. Instead, *Amici* seek to use their case, *Sniado*, to demonstrate the serious deficiencies of, and harmful consequences flowing from, the rule announced in *Empagran* and *Sniado* – consequences so detrimental that they expose the error of the D.C. and Second Circuits' interpretations of the FTAIA.

First, *Sniado* illustrates the type of antitrust action that will clog the federal courts if the announced rule is upheld. Like this case, many future suits are likely to be based on alleged antitrust violations the effects of which are felt in foreign markets, and with U.S. effects that are at most tangential. Specifically, in *Sniado*, an individual, John Sniado, filed a class action under Section 1 of the Sherman Act, alleging that he paid "'supra-competitive fees'" to certain of the European Banks when exchanging one European currency for another European currency. *Sniado* Pet. App. 10a. It was conceded that Mr. Sniado's transactions occurred solely in Europe. *Id.* Mr. Sniado thus seeks to recover for alleged injuries from exchanges of *European* currencies at certain *European* banks in *Europe*. He bases his allegations on a European Union investigation into alleged conspiracies to fix the rates for

exchanging European currencies (*id.* at 2a-3a), but he has failed to allege that the European Union's investigation found any evidence that the conspiracies were intended to or did have any effects in the United States. Significantly, *Amici* are aware of no plaintiff, in *Sniado* or any other case, alleging injury resulting from the conduct at issue in *Sniado*. To gain the benefits of a U.S. forum and U.S. antitrust law, however, Mr. Sniado will look hard for such evidence: Discovery will be necessary to determine whether the alleged conspiracy in fact had a "'direct, substantial, and reasonably foreseeable effect'" on U.S. commerce. *Id.* at 6a, 13a.

The consequences of the D.C. and Second Circuits' rule for U.S. district courts are appalling and cannot be what Congress intended. The district courts will be required to adjudicate a multitude of antitrust actions filed by foreign plaintiffs based on anticompetitive conduct affecting only foreign commerce, so long as "someone" has been injured by such conduct's effect on the U.S. economy. See *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427-28 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); U.S. *Amicus* Br. in *Empagran*, Pet. App. 79a. U.S. courts will have to police and remedy injuries in foreign markets, such as the vitamin and currency markets outside the U.S. at issue in *Empagran* and *Sniado*, despite the absence of any U.S. interest. The United States simply has no dog in such fights.

Second, *Sniado* shows that the practical realities of the above-described assumption of jurisdiction are daunting. Permitting plaintiffs whose injuries arise in foreign markets to sue under U.S. antitrust laws would significantly "burden[] the courts." *Associated Gen. Contractors of Cal., Inc.* v. *California Council of Carpenters*, 459 U.S. 519, 545 (1983) ("*AGC*"). For example, in cases involving European transactions, discovery will be particularly burdensome because the witnesses and evidence will often be located outside the United States, raising complex issues under the

Hague Evidence Convention[3] and substantial issues of international comity. District courts will also have to perform the difficult task of ascertaining whether certain defendants have a presence in the United States that is adequate to allow the courts to assert personal jurisdiction. Assessing damages will be exceptionally difficult because U.S. courts will have to evaluate economic effects on foreign markets, many of which do not have available the same empirical data found in the United States.

In *Sniado*, for example, the court potentially will have to assess the effect of the alleged price-fixing conspiracy on Euro-zone markets of Austria, Belgium, Germany, Italy and the Neatherlands, among others. Assessing the effects of antitrust violations on foreign markets will undoubtedly "require additional long and complicated proceedings involving massive evidence and complicated theories." *AGC*, 459 U.S. at 544 (internal quotation marks omitted). The litigation may involve documents in foreign languages addressing European markets or witnesses familiar only with such markets, and not U.S. markets. The sole relationship between such litigation and the United States would be the nationality of the lawyers, and the allegation that "someone" other than the plaintiff had been injured in U.S. commerce. "[M]assive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." *Id.* at 545

The lower courts' rule also will burden the district courts with substantial collateral litigation. In *Empagran*, it was conceded that someone had been injured by the effect of the vitamin distributors' conduct on U.S. commerce. But often that will not be the case, as in *Sniado*. In fact, beyond his boilerplate allegation that petitioners' conduct caused "direct,

[3] Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444.

substantial, and reasonably foreseeable" effects on U.S. commerce, 15 U.S.C. § 6a, Mr. Sniado alleged nothing establishing that the alleged conspiracies had any effects in the United States. Indeed, although he brought this case as a putative class action, Mr. Sniado did not and presumably was unable (despite multiple opportunities to amend his complaint) to add a named plaintiff who claimed injury by reason of currency exchanges in the United States. See *Sniado* Pet. App. 12a-14a. The European Banks, moreover, know of no U.S. actions seeking recovery for injuries suffered in U.S. commerce as a result of the alleged antitrust violations about which Mr. Sniado complains.

Thus, if the D.C. and Second Circuits' ruling stands, antitrust litigation alleging purely foreign injury will often require discovery into whether the defendants' anticompetitive conduct has caused injury to some non-party in U.S. commerce. The plaintiff will be attempting to prove, as a prerequisite to suit, not that he or she suffered a injury, but that some person not before the court has suffered a cognizable harm as the result of a "direct, substantial and reasonably foreseeable" effects of the defendant's conduct on U.S. commerce. This situation is absurd and is alien to a judicial system in which parties cannot, as a general matter, seek relief based on an injury suffered by a third party. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

The proposition is especially alien in antitrust law where there is a long established requirement that an antitrust plaintiff plead and prove an injury that is "of the type the antitrust laws were designed to prevent," *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986), and that "flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Like *Empagran*, *Sniado* raises the question whether purchasers who have been injured only in foreign commerce by alleged anticompetitive conduct have standing

to pursue damages for their foreign injuries in U.S. courts. See 352 F.3d at 78-79. As the petitioners in *Empagran* have pointed out, the D.C. Circuit's decision turned "the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick*, for the benefit of foreign plaintiffs." *Empagran* Pet. 21. This point is even more compelling where, as here, there is no conceivable impediment to the filing of lawsuits by plaintiffs whose injuries arise out of the alleged conspiracy's effect on U.S. commerce. Cf. *AGC*, 459 U.S. at 542 ("[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general").[4]

These litigation consequences militate powerfully against the lower courts' construction of the FTAIA.

Third, *Sniado* illustrates the substantial infringement on the sovereign prerogatives of foreign nations resulting from the D.C. and Second Circuits' rule. For reasons exemplified by *Sniado*, it is a deeply embedded principle in antitrust jurisprudence that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). See also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (U.S. statutes are not construed

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[4] *Amici* agree that the *Empagran* respondents lack standing to pursue their antitrust claims; a finding that the *Empagran* respondents lack standing would entail the same result for Mr. Sniado. Even if the *Empagran* respondents somehow have standing based on different lawsuits filed by plaintiffs claiming that the same price-fixing conspiracy at issue in *Empagran* also caused injuries in U.S. commerce, that holding would not aid Mr. Sniado. He has identified no victims injured in the United States, and thus there is a substantial likelihood that his injuries result from an alleged conspiracy with effects exclusively in foreign markets.

to apply extraterritorially absent "'clearly expressed'" congressional intent), *superceded by statute on other grounds*, *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244 (1994); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of [*Empagran*] Petition 7 ("F.R.G. *Amicus* Br."). Mr. Sniado's suit illustrates the absurd consequences of ignoring these principles: a U.S. court adjudicating allegations based on a European Union investigation into whether European banks agreed to fix rates for exchanging Euro-zone currencies in Euro-zone countries.

Foreign nations understandably believe that they have the right to regulate their own markets and economies according to their own laws and policies. Expansion of U.S. antitrust enforcement authority in the past has led to frictions between the United States and its allies. In fact, many foreign nations, including Canada and the United Kingdom, have enacted legislation intended to block enforcement of U.S. judgments for treble damages. See 2 ABA Section of Antitrust Law, *Antitrust Law Developments* 1208 (5th ed. 2002). By dramatically expanding the extraterritorial reach of the U.S. antitrust laws, the Second and D.C. Circuits' interpretation of the FTAIA will substitute U.S. courts for European Union regulators as arbiters of anti-competitive conduct in Europe – an outcome to which the United States would surely object if the tables were turned. This, in turn, promises to create new frictions between the United States and other countries over international antitrust policy and to impede efforts to promote cooperation in antitrust enforcement. See generally F.R.G. *Amicus* Br. 11-16.

The European Union and its Member States (among other foreign jurisdictions) have been aggressively prosecuting illegal cartels and levying large fines for violations of their own antitrust laws, in part by offering leniency to those who self-report violations. *Id.* at 14-16. If the decisions in *Empagran* and *Sniado* are upheld, cartel members determining whether to participate in foreign nations'

leniency programs will have to consider the potentially massive exposure they will face in U.S. courts for transactions having nothing to do with the United States. *Id.* at 16. Opening U.S. courthouses to claims for antitrust injuries suffered in foreign commerce not only would infringe on the sovereignty of foreign nations but also would threaten to undermine their efforts to enforce their antitrust laws by discouraging wrongdoers from participating in leniency programs. Impeding foreign nations' antitrust enforcement programs would directly harm U.S. interests because those programs play a vital role in cooperative efforts between the United States and other nations to deter and prosecute multi-national cartels and other antitrust violations. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of [*Empagran*] Petitioners 16-17.

In sum, the interference with foreign states' competition regulation that results from the D.C. and Second Circuits' interpretation of the FTAIA provides yet another reason to reject their erroneous rulings. See *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them").

CONCLUSION

The decision in *Empagran* should be reversed and remanded to the court of appeals with instructions to affirm the judgment of dismissal.

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Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
PLAINTIFFS MAY NOT PURSUE SHERMAN ACT CLAIMS BASED ON INJURIES SUSTAINED IN DISCRETE TRANSACTIONS OCCURRING ENTIRELY OUTSIDE U.S. COMMERCE	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Associated Gen. Contractors of Cal. Inc. v. *California Council of Carpenters*, 459 U.S. 519 (1983)	7, 8, 10
Bank Austria AG v. *Sniado*, 352 F.3d 73 (2d Cir. 2003), *petition for cert. filed*, No. 03-1015 (U.S. Jan. 12, 2004)	1, 10
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	9
Cargill, Inc. v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986)	9
Den Norske Stats Oljeselskap As v. *HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)	7
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superceded by statute on other grounds*, *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244 (1994)	10
Empagran, S.A. v. *F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir.), *cert. granted*, 124 S. Ct. 966 (2003) (No. 03-724)	1
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	9
Kruman v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (No. 02-340)	1
Matsushita Elec. Indus. Corp. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	10
Sniado v. *Bank Austria AG*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001), *vacated*, 352 F.3d 73 (2d Cir. 2003)	5
United States v. *Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)	12
Warth v. *Seldin*, 422 U.S. 490 (1975)	9

TABLE OF AUTHORITIES – continued

STATUTE	Page
15 U.S.C. § 6a	3, 9

TREATY	
Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444	8

OTHER AUTHORITY	
2 ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002)	11

STATEMENT OF INTEREST OF *AMICI*[1]

In the decision under review, *Empagran, S.A.* v. *F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) ("*Empagran*"), the D.C. Circuit construed the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to authorize plaintiffs to bring suit under U.S. antitrust law to recover for injuries arising from the effects of anticompetitive conduct on purely foreign commerce, so long as the conduct that caused their injury also "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Empagran* Pet. App. 4a. In so doing, the D.C. Circuit noted its essential agreement with the position of the Second Circuit, as established in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (No. 02-340). *Empagran* Pet. App. 4a.

Amici are European Banks (the "European Banks" or "*Amici*") that are defendants in an antitrust action filed within the Second Circuit seeking recovery for alleged injuries occurring entirely outside U.S. commerce. After the district court dismissed the amended complaint for lack of subject matter jurisdiction, the Second Circuit vacated and remanded, in accord with the analysis in *Kruman* and *Empagran*. See *Bank Austria AG* v. *Sniado*, 352 F.3d 73 (2d Cir. 2003) ("*Sniado*"), *vacating* 174 F. Supp. 2d 159 (S.D.N.Y. 2001). On January 12, 2004, the European Banks filed a petition seeking certiorari review of the Second Circuit's decision (U.S. No. 03-1015). The petition raises precisely the legal

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

issues also raised in *Empagran* and requests that the Court hold the case pending its decision in *Empagran*.

Accordingly, *Amici* have strong particular and general interests in this case. First, the decision in *Empagran* will likely resolve potentially dispositive legal issues directly presented in the antitrust action brought against *Amici*. Second, as entities routinely engaged in transactions in commerce entirely foreign to the United States but that are governed by the antitrust regimes of individual European states and the European Union, *Amici* have a substantial interest in the correct construction of the FTAIA and in preventing yet another layer of competition regulation from being applied to those transactions.

Finally, the antitrust action against the European Banks usefully illuminates problematic aspects of the ruling below. The facts of the action vividly illustrate the absence of U.S. interest in the transactions alleged to have caused antitrust injury, the extraordinary difficulty of litigating claims involving purely foreign transactions and injuries, and the extent to which such litigation intrudes upon extant foreign regulation and damages international relationships.

For each of these reasons, *Amici* have a significant interest in presenting their views to this Court and believe that the Court may benefit from that presentation.

SUMMARY OF ARGUMENT

The European Banks file this brief not to repeat the arguments of petitioners, which they fully endorse. Instead, the Banks urge the Court to focus on the antitrust action filed against them which illustrates the damaging consequences of the FTAIA interpretation announced by the D.C. Circuit and the Second Circuit – consequences so harmful that they undermine the ruling below.

First, in the antitrust action in which the European Banks are defendants, an individual seeks to recover for injuries that he allegedly incurred in Europe while exchanging one European currency for another at European banks. Although plaintiff alleges the boilerplate conclusion of "direct, substantial, and reasonably foreseeable" effects on United States commerce, he has alleged no facts indicating that the alleged anticompetitive activity caused any effects in the United States. Nonetheless, to obtain the benefits of the U.S. forum and substantive U.S. law, including treble damages, the plaintiff is seeking discovery in the hope that he can support his bare allegation that there is such an effect. Virtually any conduct affecting only foreign commerce might motivate a plaintiff to allege an effect on someone in U.S. commerce. The D.C. and Second Circuits' rule, accordingly, will result in an avalanche of antitrust actions in U.S. district courts alleging purely foreign injuries.

Second, *Sniado* starkly illustrates the practical difficulties resulting from the D.C. and Second Circuits' interpretation of the FTAIA. The rule will result in burdensome and complex discovery, and any computation of damages will require an evaluation of the effects of conduct on numerous foreign markets (potentially including, in *Sniado*, the markets of Austria, Belgium, Germany, Italy and the Netherlands, but not the United States). Moreover, because injury to "someone" in U.S. commerce is a prerequisite to a Sherman Act claim, the court will often be required to conduct collateral litigation concerning whether a person or entity *not before the court* has suffered a "direct, substantial, and reasonably foreseeable" injury in U.S. commerce. 15 U.S.C. § 6a. As we show *infra*, this would be a peculiar practice in American jurisprudence generally and in antitrust law specifically.

Third, *Sniado* makes plain that the D.C. and Second Circuits' rule will interfere with foreign states' competition regulation and create tension with those nations. The

European Union and its individual member states have a well-developed competition law, and have indicated that they do not welcome the expansion of U.S. competition law coverage to purely European transactions (any more than the United States would welcome the expansion of European Union competition law to purely U.S. transactions). Both the U.S. government and foreign nations have further concluded that expanding U.S. competition law to purely foreign transactions will undermine international cooperation and deterrence efforts.

The D.C. and Second Circuits' interpretation of the FTAIA is contrary to the statutory language, legislative history and purpose of the FTAIA; it also generates damaging consequences that serve no discernable purpose. The decision below should be reversed.

ARGUMENT

PLAINTIFFS MAY NOT PURSUE SHERMAN ACT CLAIMS BASED ON INJURIES SUSTAINED IN DISCRETE TRANSACTIONS OCCURRING ENTIRELY OUTSIDE U.S. COMMERCE.

In *Empagran*, the D.C. Circuit held that five foreign companies located in Australia, Ecuador, Panama and the Ukraine could pursue an antitrust action under the Sherman Act to remedy injuries resulting solely from purchases made outside the United States that had no impact on U.S. commerce. The court held that so long as "someone, even if not the foreign plaintiff who is before the court," has an injury arising from an effect of the defendant's conduct on U.S. commerce, every foreign plaintiff with a claim arising from a purely foreign effect can sue as well. *Empagran* Pet. App. 4a, 19a-20a. In addition, the court held that the foreign plaintiffs had suffered "'antitrust injury'" and therefore had standing to bring their claim, stating that the arguments that persuaded

the court to find jurisdiction over the claims of foreign plaintiffs complaining of foreign injuries "similarly persuade us that the antitrust laws [are] intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at 36a. The *Empagran* defendants conceded that "someone" in the United States had been injured by the effect of their conduct on U.S. commerce; the court therefore allowed plaintiffs' claim to proceed.

In *Sniado*, the antitrust action filed against the European Banks, the Second Circuit's decision rested on the proposition that the antitrust jurisdiction of U.S. courts extends to the claim of an individual who was allegedly injured when he exchanged one European currency for another at certain European banks in Europe, and who suffered no injury in commerce either within the United States or between the United States and any other country.[2] See *Sniado* Pet. App. 10a. Like the D.C. Circuit, the Second Circuit ruled that a plaintiff may bring an antitrust action in a U.S. court against foreign defendants to redress alleged injuries suffered abroad that arose entirely out of foreign commerce (and that were unrelated to any effect the foreign conduct might have had on U.S. commerce).

In contrast to *Empagran*, the Second Circuit remanded the case to the district court to determine the foreign plaintiff's standing to bring suit. *Sniado* Pet. App. 8a. Moreover, in

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[2] The Second Circuit erroneously stated that Mr. Sniado "exchanged American dollars for Euro-currencies." 352 F.3d at 75. Rather, Mr. Sniado exchanged "'currencies that make up the Euro.'" *Sniado* v. *Bank Austria AG*, 174 F. Supp. 2d 159, 160 (S.D.N.Y. 2001) (quoting Am. Comp. ¶ 5). The plaintiff alleged in his amended complaint filed in 2001: "Until Euro banknotes and coins are introduced in 2002, the currencies of the countries making up the Euro-zone are still exchanged when traveling from one Euro-zone country to another." Am. Comp. ¶ 37. The Euro-zone countries at the relevant time were Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. *Id.* The Second Circuit's error in this regard had no efffect on its legal conclusion.

Sniado, the European Banks vigorously disputed the allegation that the alleged conduct had any "'direct, substantial, and reasonably foreseeable'" effects in the United States; indeed, the plaintiff had sought discovery on the issue of subject matter jurisdiction. *Id.* at 13a. Thus, the Second Circuit also ordered the district court to determine on remand whether the alleged conduct had any effect on U.S. commerce.

The briefs of petitioners and their other *amici* in *Empagran* show that the legal rule propounded by the D.C. Circuit and the Second Circuit is contrary to the best reading of the statutory language, to the legislative history and purpose of the FTAIA, to effective deterrence of antitrust violations and to international comity and cooperation in antitrust enforcement. The European Banks fully endorse these arguments and will not repeat them here. Instead, *Amici* seek to use their case, *Sniado*, to demonstrate the serious deficiencies of, and harmful consequences flowing from, the rule announced in *Empagran* and *Sniado* – consequences so detrimental that they expose the error of the D.C. and Second Circuits' interpretations of the FTAIA.

First, *Sniado* illustrates the type of antitrust action that will clog the federal courts if the announced rule is upheld. Like this case, many future suits are likely to be based on alleged antitrust violations the effects of which are felt in foreign markets, and with U.S. effects that are at most tangential. Specifically, in *Sniado*, an individual, John Sniado, filed a class action under Section 1 of the Sherman Act, alleging that he paid "'supra-competitive fees'" to certain of the European Banks when exchanging one European currency for another European currency. *Sniado* Pet. App. 10a. It was conceded that Mr. Sniado's transactions occurred solely in Europe. *Id.* Mr. Sniado thus seeks to recover for alleged injuries from exchanges of *European* currencies at certain *European* banks in *Europe*. He bases his allegations on a European Union investigation into alleged conspiracies to fix the rates for

exchanging European currencies (*id.* at 2a-3a), but he has failed to allege that the European Union's investigation found any evidence that the conspiracies were intended to or did have any effects in the United States. Significantly, *Amici* are aware of no plaintiff, in *Sniado* or any other case, alleging injury resulting from the conduct at issue in *Sniado*. To gain the benefits of a U.S. forum and U.S. antitrust law, however, Mr. Sniado will look hard for such evidence: Discovery will be necessary to determine whether the alleged conspiracy in fact had a "'direct, substantial, and reasonably foreseeable effect'" on U.S. commerce. *Id.* at 6a, 13a.

The consequences of the D.C. and Second Circuits' rule for U.S. district courts are appalling and cannot be what Congress intended. The district courts will be required to adjudicate a multitude of antitrust actions filed by foreign plaintiffs based on anticompetitive conduct affecting only foreign commerce, so long as "someone" has been injured by such conduct's effect on the U.S. economy. See *Den Norske Stats Oljeselskap As* v. *HeereMac Vof* , 241 F.3d 420, 427-28 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); U.S. *Amicus* Br. in *Empagran*, Pet. App. 79a. U.S. courts will have to police and remedy injuries in foreign markets, such as the vitamin and currency markets outside the U.S. at issue in *Empagran* and *Sniado*, despite the absence of any U.S. interest. The United States simply has no dog in such fights.

Second, *Sniado* shows that the practical realities of the above-described assumption of jurisdiction are daunting. Permitting plaintiffs whose injuries arise in foreign markets to sue under U.S. antitrust laws would significantly "burden[] the courts." *Associated Gen. Contractors of Cal., Inc.* v. *California Council of Carpenters*, 459 U.S. 519, 545 (1983) ("*AGC*"). For example, in cases involving European transactions, discovery will be particularly burdensome because the witnesses and evidence will often be located outside the United States, raising complex issues under the

Hague Evidence Convention[3] and substantial issues of international comity. District courts will also have to perform the difficult task of ascertaining whether certain defendants have a presence in the United States that is adequate to allow the courts to assert personal jurisdiction. Assessing damages will be exceptionally difficult because U.S. courts will have to evaluate economic effects on foreign markets, many of which do not have available the same empirical data found in the United States.

In *Sniado*, for example, the court potentially will have to assess the effect of the alleged price-fixing conspiracy on Euro-zone markets of Austria, Belgium, Germany, Italy and the Neatherlands, among others. Assessing the effects of antitrust violations on foreign markets will undoubtedly "require additional long and complicated proceedings involving massive evidence and complicated theories." *AGC*, 459 U.S. at 544 (internal quotation marks omitted). The litigation may involve documents in foreign languages addressing European markets or witnesses familiar only with such markets, and not U.S. markets. The sole relationship between such litigation and the United States would be the nationality of the lawyers, and the allegation that "someone" other than the plaintiff had been injured in U.S. commerce. "[M]assive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." *Id.* at 545

The lower courts' rule also will burden the district courts with substantial collateral litigation. In *Empagran*, it was conceded that someone had been injured by the effect of the vitamin distributors' conduct on U.S. commerce. But often that will not be the case, as in *Sniado*. In fact, beyond his boilerplate allegation that petitioners' conduct caused "direct,

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substantial, and reasonably foreseeable" effects on U.S. commerce, 15 U.S.C. § 6a, Mr. Sniado alleged nothing establishing that the alleged conspiracies had any effects in the United States. Indeed, although he brought this case as a putative class action, Mr. Sniado did not and presumably was unable (despite multiple opportunities to amend his complaint) to add a named plaintiff who claimed injury by reason of currency exchanges in the United States. See *Sniado* Pet. App. 12a-14a. The European Banks, moreover, know of no U.S. actions seeking recovery for injuries suffered in U.S. commerce as a result of the alleged antitrust violations about which Mr. Sniado complains.

Thus, if the D.C. and Second Circuits' ruling stands, antitrust litigation alleging purely foreign injury will often require discovery into whether the defendants' anticompetitive conduct has caused injury to some non-party in U.S. commerce. The plaintiff will be attempting to prove, as a prerequisite to suit, not that he or she suffered a injury, but that some person not before the court has suffered a cognizable harm as the result of a "direct, substantial and reasonably foreseeable" effects of the defendant's conduct on U.S. commerce. This situation is absurd and is alien to a judicial system in which parties cannot, as a general matter, seek relief based on an injury suffered by a third party. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

The proposition is especially alien in antitrust law where there is a long established requirement that an antitrust plaintiff plead and prove an injury that is "of the type the antitrust laws were designed to prevent," *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986), and that "flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Like *Empagran*, *Sniado* raises the question whether purchasers who have been injured only in foreign commerce by alleged anticompetitive conduct have standing

to pursue damages for their foreign injuries in U.S. courts. See 352 F.3d at 78-79. As the petitioners in *Empagran* have pointed out, the D.C. Circuit's decision turned "the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick*, for the benefit of foreign plaintiffs." *Empagran* Pet. 21. This point is even more compelling where, as here, there is no conceivable impediment to the filing of lawsuits by plaintiffs whose injuries arise out of the alleged conspiracy's effect on U.S. commerce. Cf. *AGC*, 459 U.S. at 542 ("[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general").[4]

These litigation consequences militate powerfully against the lower courts' construction of the FTAIA.

Third, *Sniado* illustrates the substantial infringement on the sovereign prerogatives of foreign nations resulting from the D.C. and Second Circuits' rule. For reasons exemplified by *Sniado*, it is a deeply embedded principle in antitrust jurisprudence that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). See also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (U.S. statutes are not construed

[4] *Amici* agree that the *Empagran* respondents lack standing to pursue their antitrust claims; a finding that the *Empagran* respondents lack standing would entail the same result for Mr. Sniado. Even if the *Empagran* respondents somehow have standing based on different lawsuits filed by plaintiffs claiming that the same price-fixing conspiracy at issue in *Empagran* also caused injuries in U.S. commerce, that holding would not aid Mr. Sniado. He has identified no victims injured in the United States, and thus there is a substantial likelihood that his injuries result from an alleged conspiracy with effects exclusively in foreign markets.

to apply extraterritorially absent "'clearly expressed'" congressional intent), *superceded by statute on other grounds*, *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244 (1994); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of [*Empagran*] Petition 7 ("F.R.G. *Amicus* Br."). Mr. Sniado's suit illustrates the absurd consequences of ignoring these principles: a U.S. court adjudicating allegations based on a European Union investigation into whether European banks agreed to fix rates for exchanging Euro-zone currencies in Euro-zone countries.

Foreign nations understandably believe that they have the right to regulate their own markets and economies according to their own laws and policies. Expansion of U.S. antitrust enforcement authority in the past has led to frictions between the United States and its allies. In fact, many foreign nations, including Canada and the United Kingdom, have enacted legislation intended to block enforcement of U.S. judgments for treble damages. See 2 ABA Section of Antitrust Law, *Antitrust Law Developments* 1208 (5th ed. 2002). By dramatically expanding the extraterritorial reach of the U.S. antitrust laws, the Second and D.C. Circuits' interpretation of the FTAIA will substitute U.S. courts for European Union regulators as arbiters of anti-competitive conduct in Europe – an outcome to which the United States would surely object if the tables were turned. This, in turn, promises to create new frictions between the United States and other countries over international antitrust policy and to impede efforts to promote cooperation in antitrust enforcement. See generally F.R.G. *Amicus* Br. 11-16.

The European Union and its Member States (among other foreign jurisdictions) have been aggressively prosecuting illegal cartels and levying large fines for violations of their own antitrust laws, in part by offering leniency to those who self-report violations. *Id.* at 14-16. If the decisions in *Empagran* and *Sniado* are upheld, cartel members determining whether to participate in foreign nations'

leniency programs will have to consider the potentially massive exposure they will face in U.S. courts for transactions having nothing to do with the United States. *Id.* at 16. Opening U.S. courthouses to claims for antitrust injuries suffered in foreign commerce not only would infringe on the sovereignty of foreign nations but also would threaten to undermine their efforts to enforce their antitrust laws by discouraging wrongdoers from participating in leniency programs. Impeding foreign nations' antitrust enforcement programs would directly harm U.S. interests because those programs play a vital role in cooperative efforts between the United States and other nations to deter and prosecute multi-national cartels and other antitrust violations. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of [*Empagran*] Petitioners 16-17.

In sum, the interference with foreign states' competition regulation that results from the D.C. and Second Circuits' interpretation of the FTAIA provides yet another reason to reject their erroneous rulings. See *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them").

CONCLUSION

The decision in *Empagran* should be reversed and remanded to the court of appeals with instructions to affirm the judgment of dismissal.

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, the Sherman Act applies to claims of foreign plaintiffs whose injuries do not arise from the effects of antitrust violations on United States commerce.

2. Whether such foreign plaintiffs lack antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. 15(a).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
Respondents have no claim under the antitrust laws	7
A. The FTAIA requires a plaintiff's claim to arise out of a conspiracy's anticompetitive effect in the United States	8
1. The text of the statute requires a plaintiff to allege that his claim arises from the domestic anticompetitive effect of a Sherman Act violation	8
2. The FTAIA's legislative history does not reveal an intent to open United States courts to claims seeking redress for foreign injuries sustained as a result of foreign conduct	16
3. Important policy considerations grounded in the antitrust laws significantly undermine the court of appeals' interpretation	19
B. Plaintiffs whose injuries are not tied to a con-conspiracy's anticompetitive effect on United States commerce lack antitrust standing	25
Conclusion	30

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EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 7, 15
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Panama Const. art. 290 25
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Art. 2211 25
Art. 2241 25
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Art. 67 25
Art. 363 25
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Art. 2 25
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In the Supreme Court of the United States

No. 03-724

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and thus they have a strong interest in the correct application of those laws and in the effect of judicial interpretations on antitrust enforcement programs. The United States is concerned that the court of appeals' holding will substantially harm its ability to uncover and break up international cartels and undermine law enforcement relationships between the United States and its trading partners.

STATEMENT

1. The Antitrust Division of the United States Department of Justice has a Corporate Leniency Policy that provides amnesty from criminal prosecution in certain circumstances. 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993); <*http://www.usdoj.gov/atr/public/guidelines/0091.htm*>. In 1999, one of the petitioners, Rhone-Poulenc SA, applied for admission to the government's amnesty program for Rhone-Poulenc's role in global price-fixing and market-allocation conspiracies among domestic and foreign manufacturers and

distributors of bulk vitamins. In exchange for amnesty, the company exposed the cartel, which had sold billions of dollars of vitamins in the United States and other countries around the world. The company cooperated with the United States' subsequent investigations into violations by the vitamin companies of Section 1 of the Sherman Act, 15 U.S.C. 1. Chemical Business NewsBase: Press Release, *Rhone-Poulenc issues statement regarding vitamin business*, available in 1999 WL 17728220 (May 26, 1999); U.S. Dep't Of Justice Press Release, *F. Hoffman-LaRoche and BASF Agree To Pay Record Criminal Fines For Participating In International Vitamin Cartel* (May 20, 1999) (Press Release).

To date, the investigation triggered by Rhone-Poulenc's application for amnesty has resulted in plea agreements with twelve corporate defendants and thirteen individual defendants and the imposition of fines exceeding $900 million—including the largest criminal fine ($500 million) ever obtained by the Department of Justice under any statute. Press Release, at 1-2. Eleven of the thirteen individuals have received sentences resulting in imprisonment, and an additional individual awaits a criminal trial. European Union, Canadian, Australian, and Korean authorities similarly have obtained record civil penalties exceeding €855 million against the vitamin companies. Pet. 5; Pet. App. 68a.

In the wake of the government's investigations, domestic private parties sued the vitamin companies seeking treble damages and attorney's fees, see 15 U.S.C. 1, 15, 26, for overcharges that the domestic companies paid in United States commerce as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid amounts "exceeding $2 billion." Pet. 5; *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867 (D.D.C. Mar. 31, 2000).

2. Respondents are foreign corporations domiciled in Ecuador, Panama, Australia, and Ukraine. Pet. App. 6a; Pet. ii, 5; Br. in Opp. ii. They brought this class action on behalf

of purchasers of "vitamins abroad from the vitamin companies or their alleged co-conspirators * * * for delivery outside the United States." Pet. App. 6a. The district court held (*id.* at 47a-53a) that it lacked subject matter jurisdiction over respondents' claims against petitioners under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, which provides that the Sherman Act shall not apply to non-import foreign conduct unless it has "a direct, substantial, and reasonably foreseeable effect" on United States commerce, 15 U.S.C. 6a(1), and that "such effect gives rise to a claim" under the Sherman Act, 15 U.S.C. 6a(2).[1] The district court explained that, although respondents had alleged that "the conduct causing their injuries resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce,'" they had not alleged that the conduct's effect on United States commerce gave rise to respondents' claims. Pet. App. 48a-49a. Because the district court found subject

[1] The FTAIA, which was enacted in 1982 (Pub. L. No. 97-290, § 402, 96 Stat. 1248) and became Section 7 of the Sherman Act, 15 U.S.C. 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

matter jurisdiction lacking, the court did not reach petitioners' alternative contention that respondents lacked antitrust standing because they "fall outside the class of persons whom the Sherman Act is designed to protect." *Id.* at 53a, 54a.

3. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-42a. The court observed that the "Second and Fifth Circuits have split" on "the question whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at 14a-15a. The court explained (*ibid.*) that the Fifth Circuit in *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), cert. denied, 534 U.S. 1127 (2002), held that the plain text of the FTAIA bars claims that do not stem from the conspiracy's anticompetitive domestic effects. By contrast, the court explained (Pet. App. 16a-17a), the Second Circuit in *Kruman* v. *Christie's International PLC*, 284 F.3d 384, 400 (2002), cert. dismissed, 124 S. Ct. 27 (2003), held that the FTAIA permits suit, even when the plaintiff's injury does not arise from the domestic effect of the conspiracy, as long as the "domestic effect violate[s] the substantive provisions of the Sherman Act."

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. 20a. The majority rejected respondents' argument —based on *Kruman*, 284 F.3d at 397-400—that the "FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. 20a. The majority nonetheless interpreted the phrase "gives rise to a claim" in 15 U.S.C. 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a. The majority also found its interpretation supported by the FTAIA's legislative history, *id.* at 24a-30a, and by its view that asserting jurisdiction over

respondents' claims would maximize deterrence of international cartels by "forc[ing] the conspirator to internalize the full cost of his anticompetitive conduct," *id.* at 32a.

The majority further held that respondents have antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. 15(a). Pet. App. 33a-37a. The court reasoned that "the arguments that have already persuaded [the court] that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at 36a.

Judge Henderson dissented. Pet. App. 40a-42a. She disagreed with the majority's interpretation of the FTAIA, reasoning that the Fifth Circuit's reading was "unambiguously" supported by the Act's text and history. *Id.* at 40a.

SUMMARY OF ARGUMENT

A. The Foreign Trade Antitrust Improvements Act provides that the Sherman Act shall not apply to foreign conduct unless it has a requisite effect on United States commerce and "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). The most natural reading of that statutory language is that the required effect on United States commerce must give rise to a claim by the particular plaintiff before the court. In rejecting that interpretation, the court of appeals reached the implausible conclusion that Congress intended to permit suits in the United States that seek redress for injuries that were sustained entirely overseas and that arise out of purely foreign commerce. That conclusion finds no support in the Act's legislative history.

Such an expansive interpretation of the FTAIA would greatly expand the potential liability for treble damages in United States courts and would thereby deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government. The inter-

pretation adopted by the court of appeals thus would weaken the Department of Justice's criminal amnesty program, which has served as an effective means of cracking international cartels. That interpretation also likely would damage the cooperative law enforcement relationships that the United States has nurtured with foreign governments and would burden the federal courts with a wave of new international antitrust cases raising potentially complex satellite disputes that turn on hypothetical claims of persons not before the courts.

B. Antitrust standing principles independently support the conclusion that foreign plaintiffs whose claims arise solely from a conspiracy's effects on foreign commerce cannot bring antitrust lawsuits in United States courts. Section 4 of the Clayton Act, which defines the class of persons who may maintain a private damages action under the antitrust laws, does not provide a treble damages remedy for all injuries that result from an antitrust violation. *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). This Court accordingly has limited the types of plaintiffs who are proper parties to bring a private antitrust action based on substantive antitrust and other policy considerations.

Foreign plaintiffs whose claims arise from a conspiracy's effects outside the United States are not proper plaintiffs to invoke our antitrust laws. The focus of the FTAIA, and the fundamental purpose of the Sherman Act, are the protection of American consumers and commerce. To provide antitrust relief to respondents, even though their injuries have no connection to a conspiracy's effects on United States commerce, would divorce antitrust recovery from the central purposes of the antitrust laws.

ARGUMENT

RESPONDENTS HAVE NO CLAIM UNDER THE ANTITRUST LAWS

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. Although this Court has articulated a general presumption in other contexts that Congress intends its laws to apply only within the territorial jurisdiction of the United States, *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-583 n.6 (1986); see *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997) (holding that Sherman Act's criminal provisions apply to wholly foreign conduct with intended and substantial domestic effects), cert. denied, 522 U.S. 1044 (1998).

Consistent with that judicial construction of the Sherman Act, Congress provided in the FTAIA that the Sherman Act applies to foreign conduct when "(1) such [foreign] conduct has a direct, substantial, and reasonably foreseeable effect * * * on [United States domestic commerce] * * * and (2) such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. It is not disputed in this case that, under Section 6a, the Sherman Act applies to a plaintiff's claim that arises from an illegal conspiracy's anticompetitive effects on domestic commerce, whether the plaintiff is located here or abroad, or is a citizen of the United States or of another country. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (holding that a foreign government may sue under the Sherman Act); see *Statoil*, 241 F.3d at 427 n.22, 428 n.25.

The question presented in this case is whether the Sherman Act permits respondents to recover treble damages and attorney's fees under the United States' antitrust laws for injuries that they sustained entirely overseas and that arose out of purely foreign sales transactions that had no substantial effect on United States commerce. The court of appeals held that respondents were entitled to seek such relief on the theory that the foreign conduct by petitioners that injured respondents was part of a global price-fixing conspiracy that had anticompetitive effects in the United States, and that those effects give rise to a claim by some *other* person.

Such an expansive reach of the antitrust laws is not justified by either the text or history of the FTAIA. The result reached by the court of appeals is also highly likely to have the perverse effect of undermining the government's efforts to detect and deter international cartel activity.

A. THE FTAIA REQUIRES A PLAINTIFF'S CLAIM TO ARISE OUT OF A CONSPIRACY'S ANTICOMPETITIVE EFFECT IN THE UNITED STATES

1. *The Text Of The Statute Requires A Plaintiff To Allege That His Claim Arises From The Domestic Anticompetitive Effect Of A Sherman Act Violation*

a. The FTAIA governs whether a federal court may hear a plaintiff's complaint alleging violations of the Sherman Act involving foreign conduct. Section 6a(1) provides that the Sherman Act extends to foreign conduct only when it has a requisite effect on United States commerce. 15 U.S.C. 6a(1). That such effect was caused by the vitamin cartel has not been disputed. Pet. App. 9a. A requisite effect is not enough to establish that the Sherman Act applies to foreign conduct, however, for Section 6a(2) imposes the further condition that

"such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2).[2]

It is a "fundamental principle of statutory construction" that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., AVCO Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (internal quotation marks omitted). The FTAIA's focus is explicitly and only on the *domestic* effect of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of the plaintiff's injury is entirely foreign and that injury arises exclusively from a price-fixing or market-allocation conspiracy's effect on foreign commerce. Accordingly, read in context, by far the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" under the Sherman Act is that the requisite anticompetitive effect on domestic commerce must give rise to a Sherman Act claim brought by the *particular plaintiff* before the court.

The requirement that a plaintiff tie his own claim to a conspiracy's domestic anticompetitive effect does not conflict with a supposedly literal or "plain" meaning of Section 6a(2), based on its use of the indefinite article "a," as has been suggested. See *Kruman*, 284 F.3d at 400; *Statoil*, 241 F.3d at 432 (Higginbotham, J., dissenting). "The word 'a' has varying meanings and uses," and "the meaning depends on context." *Black's Law Dictionary* 1 (6th ed. 1990). And in particular, although "[*a*] (or *an*) is called the indefinite article,"

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[2] The court of appeals treated the FTAIA as setting forth a threshold requirement for subject matter jurisdiction rather than a substantive element of a Sherman Act claim. Pet. App. 8a; see generally *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 949-951 (7th Cir.) (en banc), cert. denied, 124 S. Ct. 533 (2003). That issue has no bearing on the question of statutory interpretation before the Court, *i.e.*, whether the Sherman Act applies to foreign conduct when a claim by the plaintiff does not arise from a conspiracy's effect on United States commerce.

"[a]ctually, it is used to indicate a definite but unspecified individual, as in *a man in our town.* * * * When we wish to refer indefinitely to a single person or thing we say *any*, as in *any man in our town, any library book*." Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 3 (1957). Thus, the article "a" is far too slender a reed on which to rest the conclusion that Congress intended to give Section 6a(2) an unprecedented world-wide scope whenever *any* person in the domestic commerce of the United States would have *any* claim under the Sherman Act based on the same conduct.

Moreover, the article "a" in Section 6a(2) is immediately followed by the specific term "claim." 15 U.S.C. 6a(2). Congress surely intended a federal court to examine not *any* hypothetical "claim," but a claim that is being asserted by the party seeking to invoke the jurisdiction of the court in the case actually pending before it. In other words, the reference to "a claim" *presupposes*, but leaves unstated, that the "claim" to which the conduct in question "gives rise" is one advanced by the plaintiff. In this respect, Section 6a(2) is just like Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides for dismissal of a complaint for "failure to state a claim on which relief can be granted." Surely Rule 12(b)(6) refers to "a claim" asserted by the plaintiff in the case, not by some other hypothetical person not before the court. Accordingly, to recognize jurisdiction in a federal district court under the United States' antitrust laws over a private action lacking the requisite "effect" on United States commerce—on the premise that the requirement of such "a claim" might be satisfied by some third party—"would not be consistent with the 'sense of the thing,' and would confer upon [the court] jurisdiction beyond what 'naturally and properly belongs to it.'" *Heckler* v. *Edwards*, 465 U.S. 870, 879 (1984) (citation omitted). Instead, the critical inquiry under Section 6a(2) "is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce?" *Statoil*, 241 F.3d at 427 n.22.[3]

For similar reasons, the Second Circuit in *Kruman*, 284 F.3d at 397-400, erred in concluding that the only relevant inquiry is whether the conduct that caused the anticompetitive domestic effect violated the substantive provisions of the antitrust laws, such that the *government* would have a valid claim for injunctive relief under Section 4 of the Sherman Act, 15 U.S.C. 4. Under that view, the phrase "gives rise to a claim" adds nothing, because the United States always has a claim under Section 4 of the Sherman Act whenever that Act is violated. Nor is there any suggestion in the FTAIA's text that Congress intended the availability of relief under the Sherman Act to turn on whether the government would have a claim—particularly since the FTAIA equally governs whether a private party may seek relief, and a price-fixing conspiracy that violates Section 1 of the Sherman Act, 15 U.S.C. 1, does not "give[] rise" to a private "claim" under the Sherman Act in the absence of injury to the particular plaintiff. See 15 U.S.C. 15(a) (providing for private right of action to "any person injured in his business or property"). In short, as the court of appeals in this case pointed out, "[t]he view that FTAIA must be taken to refer only to defendant's conduct tends to ignore the fact

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[3] Contrary to respondents' contention, the government's reading of the statute does not mean that only injury that occurs *in the United States* comes within the terms of the FTAIA. Br. in Opp. 20-21. Rather, the text of the FTAIA requires that any anticompetitive injury, whether here or abroad, arise from the conspiracy's requisite effect on domestic commerce. See, *e.g.*, *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1086-1087 (D.C. Cir. 1998) (while the situs of injury was overseas, plaintiff's claim arose from a conspiracy's effect on the United States advertising market). Moreover, the federal agencies charged with the responsibility of enforcing the antitrust laws "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties." U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines For International Operations* § 2 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589-20,592 (Apr. 5, 1995).

that FTAIA does refer on its face to the conduct's effect giving rise to a claim"—which even the court acknowledged "arguably refers to a plaintiff's injury." Pet. App. 21a.

Thus, when the court of appeals recognized that "the usual meaning of 'a claim' is a private action," Pet. App. 22a, it should have further recognized that, in the context of a statute governing a private civil action, the words "a claim" are most naturally understood to refer to a claim that is actually being asserted in the civil action arising under that statute. Indeed, we are not aware of any statutory scheme that makes the determination of statutory coverage turn on whether a person not before the court, *i.e.*, a hypothetical plaintiff in some other civil action, has a claim. Ordinarily, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). "This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990).

b. The implausibility of the panel's expansive interpretation of Section 6a(2) is confirmed by the fact that it would produce results that Congress could not have intended. The panel's holding would open United States courts to suits that are strikingly localized to foreign countries. For example, under the panel's holding, a buyer in Nigeria could file suit in the United States against its own Nigerian supplier if that supplier was a member of an international cartel, simply by alleging (and being able to prove if contested, see, p. 22, *infra*) that some unnamed third person who was injured by the same cartel in United States commerce would have a claim under the Sherman Act.

In other words, under the panel's reading of Section 6a(2), once *any* person is determined to have a claim arising from

an injury resulting from the domestic anticompetitive effects of a conspiracy, any foreign purchaser can piggyback on that claim and sue for treble damages in United States courts, even when that purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." Pet. App. 4a. Consider, for example, an international price-fixing cartel with wholly foreign members that had annual foreign sales of $2 billion to 50 foreign customers, and annual sales in the United States of $1 million to one customer. Because the domestic customer could sue based on the conspiracy's domestic effects, all 50 foreign customers also could bring a claim under the Sherman Act, "even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *Statoil*, 241 F.3d at 427-428.

No decision pre-dating the FTAIA has been cited that permitted such a suit. *Statoil*, 241 F.3d at 429 ("[W]e have found no case in which jurisdiction was found in a case like this—where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market."). Congress passed the FTAIA to "exempt from the Sherman Act export transactions that did not injure the United States economy," *Hartford Fire Ins. Co.*, 509 U.S. at 796 n.23, and to create a "single, objective test—the 'direct, substantial, and reasonably-foreseeable effect' test"—to "serve as a simple and straightforward clarification of *existing* American law," H.R. Rep. No. 686, 97th Cong., 2d Sess. 2 (1982) (House Report) (emphasis added). It is highly doubtful that the same Congress that intended to codify *limits* on the extraterritorial reach of the antitrust laws intended at the same time to bring about the sweeping expansion that the court of appeals' decision would accomplish.

c. The statutory text should also be read in light of background principles concerning the extraterritorial reach of United States law. As noted above (see p. 7, *supra*),

although this Court has adopted a general presumption that Congress intends for its laws to apply only within the territorial jurisdiction of the United States, it is well established—quite apart from the FTAIA—that the Sherman Act applies to foreign conduct that was meant to and did produce some substantial effect in the United States. And the FTAIA ratifies that fundamental proposition by providing that the Sherman Act applies to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on the domestic commerce of the United States, if that effect in turn "gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. The Sherman Act and the FTAIA have thus supplanted any general background presumption against extraterritoriality within those fields involving effects on domestic commerce. It does not follow, however, that general background principles are entirely irrelevant in considering the further question presented in this case.

Here, respondents' alleged injuries do not flow from any effect of petitioners' conduct on the domestic commerce of the United States (*e.g.*, from sales to customers in the United States), which would fall within the rubric of *Hartford Fire Insurance Co.* and the terms of the FTAIA. They instead flow from sales transactions that occurred outside the United States, either entirely within one foreign country or between a seller in one foreign country and a purchaser in another. To apply the Sherman Act to those transactions would extend the Act one significant step further than this Court's Sherman Act decisions culminating in *Hartford Fire Insurance Co.* and anything required by the terms of the FTAIA. Such an application would regulate not merely the defendants' conduct (their conspiracy to fix prices and allocate markets) and the remedies for persons injured by that conduct in United States commerce (persons who bought vitamins from those defendants at supracompetitive prices in domestic sales transactions). It also would subject wholly foreign sales transactions having no significant effect

on United States commerce to regulation under our antitrust laws, by affording a Sherman Act claim to injured purchasers of vitamins in foreign countries against the defendants who charged them supracompetitive prices in those foreign transactions. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

In *Foley Brothers* v. *Filardo*, 336 U.S. 281 (1949), this Court held that a federal law requiring employers to pay overtime for work in excess of an eight-hour day did not apply in a foreign country. Because the statute and associated cause of action were motivated by "concern with domestic labor conditions," the Court saw no reason to apply them to conditions in foreign countries. *Id.* at 286. The Court concluded that "[a]n intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." *Ibid.* Similarly, in *EEOC* v. *Arabian American Oil Co.*, the Court declined to apply Title VII to employment in a foreign country in the absence of "clearer evidence of congressional intent." 499 U.S. at 255. In both cases, the Court's conclusion was reinforced by its determination that to subject such transactions or relationships in foreign countries to United States law would risk friction with the foreign governments concerned. So too here, in the absence of a clearer expression of congressional intent, the Court should not interpret Section 6a(2) to afford a private claim under the Sherman Act to foreign purchasers in wholly foreign sales transactions, which "are the primary concern of a foreign country" when such sales have no significant effect on our commerce. *Foley Bros.*, 336 U.S. at 286; see, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19, 21 (1963); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959).

2. *The FTAIA's Legislative History Does Not Reveal An Intent To Open United States Courts To Claims Seeking Redress For Foreign Injuries Sustained As A Result Of Foreign Conduct*

The court of appeals' majority acknowledged that portions of the FTAIA's legislative history could be read to support the government's interpretation of the Act, Pet. App. 24a, 29a, but concluded that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *ibid.* The majority thus assumed that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation—a dubious analytical approach to begin with for a statute that was prompted in significant part by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions. House Report 2.

More fundamentally, however, the majority looked for an answer to the wrong question in its review of the legislative history. Because application of the Sherman Act to wholly foreign sales transactions having no substantial effect on United States commerce would be contrary to the most natural reading of the text of the FTAIA and to the background presumption against application of United States laws to transactions in foreign countries, the proper question is whether the legislative history contains a clearly expressed intent to extend the reach of the Sherman Act in that manner. There is no suggestion, much less a clear expression, of such an intent. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The only explicit mention of suits by foreign purchasers, and the deterrent effect such suits might have, is a discussion in the House Report of this Court's decision in *Pfizer*, *supra*. House Report 10. *Pfizer*, however, addressed

neither the extraterritorial reach of the antitrust laws nor the extent to which a plaintiff's claim must have some connection to United States commerce. Rather, *Pfizer* held that a foreign government that purchased goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." 434 U.S. at 320. Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *id.* at 314, the Court's decision in *Pfizer* involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. *Id.* at 318 (observing that foreign governments "enter[ed] our commercial markets as a purchaser of goods or services"). The Court nowhere intimated that the purposes of the antitrust laws would support the availability of a private treble damages action when foreign injury is sustained exclusively as a result of *foreign* conduct, and the House Report's discussion of *Pfizer* therefore carries no such intimation either.

The remainder of the legislative history, in fact, cuts strongly against such an interpretation. For example, the House Report states that the Act "preserves antitrust protections in the *domestic* marketplace for all purchasers, regardless of nationality or the situs of the business." House Report 10 (emphasis added).[4] Such purchasers, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from a conspiracy's foreign anticompetitive effects. Pet. App. 8a. Other passages in the House Report uniformly tie the application of United States anti-

[4] There was no Senate Report on the bill, and the brief discussion in the conference report, H.R. Conf. Rep. No. 924, 97th Cong., 2d Sess. 29-30 (1982), sheds no light on the issue.

trust laws to foreign transactions to a domestic anticompetitive effect.[5]

Finally, the explanation in the legislative history for the language of Section 6a(2) as ultimately enacted strongly undermines the court of appeals' interpretation. The House Judiciary Committee amended the relevant bill, as proposed by the Subcommittee, to add Section 6a(2) with language that provided that "(2) such effect is the basis of the violation alleged." House Report, 16; H.R. 5235, 97th Cong., 2d Sess. § 2 (Aug. 2, 1982). Absent that subsection, the House Report explained, a plaintiff might have been able to bring suit in federal court "merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment." House Report 11. The Report explained that the language the Committee added would "require that the 'effect' providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws.*" *Id.* at 11-12 (emphasis added). That passage unambiguously contemplates that the plaintiff's claim must be based on injury resulting from the

[5] See, *e.g.*, House Report 5 ("Since Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-444 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies."); *ibid.* (quoting Antitrust Div., DOJ, *Antitrust Guide to International Operations* 6-7 (1977) ("[I]t would be a miscarriage of Congressional intent to apply the Sherman Act to 'foreign activities which have no direct or intended effect on United States consumers or export opportunities."); *id.* at 7 (bill would "reinforc[e] the fundamental commitment of the United States to a competitive domestic marketplace"); *id.* at 9-10 ("A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on a domestic consumer or a domestic competitor.").

domestic effect of the defendant's conduct in violation of the Sherman Act.

As contemplated in the separate statement by Chairman Rodino (see House Report 18), Section 6a(2), as added by the Committee, was subsequently amended to require that "such effect gives rise to a claim." The Chairman stated that "[t]he substituted language accomplishes the same result as the Committee version" but was preferable "because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." *Ibid.* Thus, Section 6a(2) as finally enacted was intended to accomplish the same result as the language the House Report described as requiring that the "effect" of the defendant's conduct on United States commerce "must also be the basis for the injury alleged"—*i.e.*, by the plaintiff—"under the antitrust laws." *Id.* at 2. The decision of the court of appeals cannot be reconciled with that expression of congressional intent.

3. *Important Policy Considerations Grounded In The Antitrust Laws Significantly Undermine The Court Of Appeals' Interpretation*

a. The court of appeals' interpretation of the FTAIA would substantially interfere with the primary enforcement of the antitrust laws by the United States Government. Price-fixing conspiracies, including those operating globally, are inherently difficult to detect and prosecute. Cooperation by one of the conspirators, through provision of documents or testimony, is often vital to law enforcement.

In light of those practical realities, the Antitrust Division of the Department of Justice maintains a robust amnesty program that offers strong incentives to conspirators who voluntarily disclose their criminal conduct and cooperate with prosecutors. Cf. Germany Am. Br. Pet. Stage 14-16 (discussing EU and German amnesty policies). Since 1993, the program has offered: (1) automatic (*i.e.*, not discretionary) amnesty to corporations that come forward prior to an

investigation and meet the program's requirements; (2) the possibility of amnesty even if cooperation begins after an investigation is underway; and (3) if a corporation qualifies for automatic amnesty, all directors, officers, and employees who come forward and agree to cooperate also receive automatic amnesty. 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993). Critically, amnesty is available only to the first conspirator to break ranks with the cartel and come forward. The incentives, transparency, and certainty of treatment established by the program set up a "winner take all" dynamic that sows tension and mistrust among cartel members and encourages defection from the cartel.

The amnesty program has been extremely valuable to enforcement of the antitrust laws. The majority of the Antitrust Division's major international investigations, including the investigation of the vitamin cartel, have been advanced through cooperation of an amnesty applicant. The program has been responsible for cracking more international cartels than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations *combined*. Since 1997, cooperation from amnesty applications has resulted in scores of criminal convictions and more than $1.5 billion in criminal fines.

The court of appeals' interpretation of Section 6a would undermine the effectiveness of the government's amnesty program. Even those conspirators who come forward and receive amnesty from *criminal* prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a). Potential amnesty applicants therefore weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty program. The court of appeals' interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability. Faced with joint and several liability for coconspirators' illegal acts all over the world, a conspirator could not readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.

From a practical standpoint, moreover, the court of appeals' analysis of deterrence is unsound because its focus is on private lawsuits that often follow the exposure of a cartel by the government. Such lawsuits are possible, of course, only if the cartel is discovered in the first place. A private action "supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

In the government's judgment, the amnesty program, by creating a high risk of defection and exposure, deters cartel behavior more effectively than an increase in private litigation after the cartel has been exposed. It follows that deterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and thus expose cartels in the first place.

b. The court of appeals' holding would also present a risk of undermining the foreign relations of the United States. Germany, a major trading partner of the United States, expressed the view in its amicus brief at the petition stage (at 9) that, "[b]y applying the United States' antitrust laws in cases where neither the plaintiff nor the alleged harm has direct effects on United States commerce, the court of appeals' decision fails to respect the fundamental right of foreign sovereigns to regulate their own markets and industries." We understand that other countries share that view. A scheme in which United States courts would adjudicate treble damages actions arising out of transactions that occur wholly in foreign countries and that have no meaningful connection to the United States would be likely to result in tension with our trading partners and attempts by foreign

countries to enact statutory counter-reactions to any judgments entered in such suits. See *id.* at 11-14 (describing foreign "blocking" and "claw back" statutes and refusals to enforce certain United States judgments). It is for reasons such as these that the Court declined to apply United States law to transactions in foreign countries in *Arabian American Oil Co.* and *Foley Brothers*. See p. 15, *supra*.

Extension of the Sherman Act to foreign transactions having no substantial relation to the United States might also undermine the cooperative relationships that this Nation's antitrust agencies have forged with their foreign counterparts in recent years. In the cartel area, conspiratorial meetings frequently take place in more than one country, witnesses may be scattered around the world, and documentary evidence may be located in multiple jurisdictions. Effective prosecution of an international cartel requires the ability to gather evidence in different countries and, frequently, coordination of investigative strategies among multi-national enforcement agencies. Because the United States and many of its foreign counterparts now have similar views on the seriousness of cartel behavior (see *infra*, p. 24), and effective mechanisms for coordinating investigations, the United States has become more effective in attacking conspiracies that straddle borders. But those cooperative relationships depend on mutual good will and reciprocity. If our foreign counterparts fear that the fruits of their cooperation ultimately will be used to support follow-on treble damage actions in the United States that they perceive as inappropriate, cooperation may be strained, to the overall detriment of international cartel enforcement.

c. The court of appeals' decision also would be likely to burden the federal courts with a wave of antitrust cases raising potentially complex satellite disputes. For cases in which defendants contest whether the Sherman Act applies to foreign conduct covered by the FTAIA, plaintiffs must prove both that the challenged foreign conduct had the

requisite effects on United States commerce and that those effects give rise to a claim. 15 U.S.C. 6a(1) and (2).

For plaintiffs whose injuries are sustained in United States commerce, proof of the FTAIA's prerequisites will overlap substantially with the merits of the plaintiff's claim. But for plaintiffs entitled to sue under the court of appeals' holding, *i.e.*, plaintiffs whose injuries are sustained entirely abroad and arise from purely foreign transactions, the statutory inquiry would turn on claims and persons not before the court. Courts faced with such suits nonetheless would be forced to adjudicate whether the challenged foreign conduct was part of some global conspiracy, whether that global conspiracy had the requisite effects on domestic commerce, and whether some third person was injured in United States commerce in such a way that gave rise to a claim. Pet. App. 4a, 20a. Those questions might be intensely factual, hotly disputed, and difficult to resolve, particularly when the critical person and claim are not before the court. The court of appeals' decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.

d. The court of appeals failed to take into account any of the foregoing considerations. It rather believed that "forc[ing] the conspirator to internalize the full costs of his anticompetitive conduct" would provide maximum deterrence to cartels that injure American consumers. Pet. App. 32a. The theoretical possibility of additional deterrence contemplated by the court, however, would come only at the expense of weakening the ability of the United States government to discover the wrongdoing in the first place. The court of appeals similarly overlooked that the primary deterrent to cartel activity is the threat of imprisonment and other criminal penalties (especially when heightened through the fear of exposure created by the amnesty program). Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., *Detecting and Deterring Cartel Activity Through an*

Effective Leniency Program (Brighton, England, Nov. 21-22, 2000) ("Based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials.") (available at <*http://www.usdoj.gov/atr/public/speeches/9928.htm*>). Criminal fines also can be substantial, as the penalties imposed on the participants in the vitamin cartel demonstrate. P. 2, *supra*.[6]

The court of appeals likewise failed to consider the large number of antitrust statutes around the world that deter and punish cartel activity. It is our understanding that approximately 100 countries now have comprehensive antitrust laws, and at least one-third of those, including most of the major industrialized countries, allow private lawsuits to recover damages for antitrust violations or provide for damages in conjunction with administrative proceedings.[7] Private civil suits have been filed against the vitamin cartel in Canada, the United Kingdom, Germany, Belgium, and the Netherlands, and class actions have been filed in Canada, Australia, and New Zealand. Pet. 5. At least three of the four home countries of respondents have antitrust laws that

[6] Persons who violate the Sherman Act are subject to a maximum statutory term of imprisonment of three years, a statutory maximum corporate fine of $10 million, and a statutory maximum individual fine of $350,000. 15 U.S.C. 1. Fines may exceed those amounts however, as defendants may be fined up to twice the gross gain from the offense or twice the gross loss to victims of the offense if those amounts exceed the Sherman Act's maximum fine. 18 U.S.C. 3571. Defendants may also be ordered to pay restitution in the full amount of the victim's loss. 18 U.S.C. 3663, 3663A; U.S.S.G. § 8B1.1.

[7] *E.g.*, ABA Section of Antitrust Law, *Competition Laws Outside the United States* 1:13, 2:13-14, 3:16-17, 9:11, 10:10 (2001); Global Competition Review, *Cartel Regulation, Getting the Fine Down in 25 Jurisdictions Worldwide* (2002); Global Competition Review, *Private Antitrust Litigation in 16 Jurisdictions Worldwide* (2004); World Trade Organization, Working Group on the Interaction Between Trade and Competition Policy, *Overview of Members' National Competition Legislation, Note by the Secretariat*, WT/WGTCP/W/128/Rev. 2 (July 4, 2000), available at <*http://www.wto.org/english/tratop_e/comp_e/comp_e.htm*>

prohibit price-fixing and laws that authorize private civil actions by persons who suffer damages from antitrust violations.[8] These countries have enacted the remedies that their governments consider appropriate, and United States law should not promote forum shopping that undermines those sovereign judgments.

B. PLAINTIFFS WHOSE INJURIES ARE NOT TIED TO A CONSPIRACY'S ANTICOMPETITIVE EFFECT ON UNITED STATES COMMERCE LACK ANTITRUST STANDING

Even if the Court were to conclude, contrary to our submission in Point A, that the FTAIA does not limit the application of the Sherman Act itself in a manner that excludes claims arising from wholly foreign sales transactions with no significant effect on United States commerce, respondents' suit must fail because the Clayton Act does not in any event offer a cause of action in these circumstances.

1. Section 4 of the Clayton Act, 15 U.S.C. 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for treble damages and attorney's fees. Despite that broad language, Section 4 never was intended

[8] Australia Trade Practices Act § 45A (agreement is unlawful if it has purpose or effect of "fixing, controlling or maintaining * * * the price for * * * goods or services") and Federal Court of Australia Act § 33C, *et seq.*; Panama Const. art. 290 and Law No. 29 of 1996 arts. 5, 11(1) (per se violations include any agreement that involves "to fix, manipulate, arrange or impose the sale or purchase price of goods or services or to exchange information with the same purpose or effect"), 142 (allowing suit by "any affected party"); Law of Ukraine On Restriction of Monopolism and Prevention of Unfair Competition in Business Activities (1992) and Law of Ukraine On Protecting the Economic Competition art. 55 (2001). The situation in Ecuador is less clear, but it does appear that damages caused by cartel behavior (which appears to be illegal in Ecuador, Crim. Code arts. 67, 363) may be available under Ecuador's general consumer protection and contract laws. Ecuador Organic Law for Consumer Protection arts. 2, 51, 70, 87; Civ. Code arts. 2211, 2241, 2256.

"to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated General Contractors*, 459 U.S. at 529; accord *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 877 (2004) (concurring opinion of Stevens, J). Thus, even if an antitrust plaintiff has suffered harm sufficient to satisfy the constitutional standing requirement of "injury in fact," the court must make a further determination whether the plaintiff has "antitrust standing," *i.e.*, "whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors*, 459 U.S. at 535 n.31.

This Court accordingly has established several limitations on antitrust standing based on substantive antitrust and policy considerations. For instance, in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), the Court held that States could not sue in their *parens patriae* capacity for damages to their general economy. Similarly, in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the Court held that the antitrust laws do not provide relief to indirect purchasers who paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), the Court held that a plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." And in *Associated General Contractors*, 459 U.S. at 545, the Court found that a union lacked antitrust standing to sue a multi-employer association for alleged antitrust violations, after considering "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy."

Those decisions establish that antitrust standing should be denied to a plaintiff whose suit would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Brunswick*, 429 U.S. at 487; accord *Associated General Contractors*, 459 U.S. at 538 (observing that the plaintiff should be seeking to redress injuries that are tied to the central purposes of the antitrust laws). In analogous circumstances, this Court has interpreted the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and other statutes to deny standing when the plaintiff's interests do not fall within the "zone of interests" protected by the statute. *E.g.*, *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998); *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997); see *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) (applying zone of interests analysis to the antitrust laws).

2. Foreign purchasers in transactions having no substantial connection to United States commerce are not proper plaintiffs under Section 4 of the Clayton Act. As explained above, there is a background presumption that Congress did not intend to regulate such transactions in foreign countries under United States law, and nothing in the Clayton Act itself suggests a congressional intent to afford a treble damages remedy. The FTAIA did not amend the Clayton Act, and nothing in the text or history of the FTAIA's amendment of the Sherman Act suggests a congressional intent, much less a "clear statutory command" (*Brunswick*, 429 U.S. at 487), to displace the background presumption and create a treble damages remedy under the Clayton Act for a wide class of global plaintiffs whose injuries have no connection to United States commerce. To the contrary, the House Report makes clear (at 11) that the FTAIA was "not intend[ed] to alter existing concepts of antitrust injury or antitrust standing." And to conclude, as did the court of appeals, that such a class of plaintiffs may sue based on the rights of third

parties who were injured in the United States conflicts with basic principles of standing generally. See p., 12, supra.

The court of appeals reasoned that "[t]he foreign plaintiffs' paying of inflated prices in foreign commerce" was a loss that the antitrust laws were designed to prevent. Pet. App. 35a. The fact that respondents were direct purchasers victimized by a price-fixing conspiracy, however, does not mean that respondents suffered the kind of injury contemplated by Section 4 of the Clayton Act when their particular injuries did not arise from anticompetitive effects on United States commerce. Under the FTAIA, the conduct of petitioners at issue in this case was unlawful under the Sherman Act only because of its anticompetitive effect on domestic United States commerce. Respondents' injury, which is not based on any such an effect, does not "flow[] from that which makes the defendants' acts unlawful," *Brunswick Corp.*, 429 U.S. at 489, and therefore is outside the zone of interests protected by the antitrust laws.

"American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Rather, the central purpose of the antitrust laws is to protect consumers, competition, and commerce *in the United States*. "Congress' foremost concern in passing the antitrust laws was the protection of Americans." *Pfizer*, 434 U.S. at 314; see 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h, at 358 (2d ed. 2000) ("[The FTAIA] makes clear that the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers."); *Turicentro, S.A.* v. *American Airlines Inc.*, 303 F.3d 293, 307 (3d Cir. 2002) ("Plaintiffs' injuries occurred exclusively in foreign markets. They are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act."). Accordingly, to award treble damages and attorney's fees to a class of foreign plaintiffs whose injuries arise exclusively from a conspiracy's

foreign anticompetitive effects would "divorce antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Brunswick Corp.*, 429 U.S. at 487; *Matsushita*, 475 U.S. at 582-284 & nn. 6 & 7 (antitrust damages unavailable except where foreign conduct caused plaintiffs' injury in American market).[9]

The conclusion that the Clayton Act does not afford respondents a cause of action is reinforced by the fact that private suits such as this would undermine enforcement of the Sherman Act by the United States Government, which is primarily responsible for protecting American consumers and markets. All of the lower court decisions interpreting Section 6a(2), *i.e.*, this case, *Kruman* and *Statoil*, have involved private actions by foreign plaintiffs that followed directly on the heels of criminal or civil enforcement actions initiated by United States and foreign antitrust authorities. As explained previously, the United States' experience is that the most effective method of enforcement features an amnesty program that offers strong incentives to conspirators to break ranks with and expose their cartels by seeking amnesty from criminal prosecution. Greatly expanding the scope of private follow-on litigation would weaken the incentives to seek amnesty, and ultimately weaken the protection of United States consumers by making international cartels difficult to detect. See pp. 19-21, *supra*. Opening our courts to suits with no connection to United States commerce also would risk undermining the relationships with foreign governments that are important to the

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[9] The court of appeals viewed respondents as proper plaintiffs because respondents' claimed injuries, in the court's view, suffered none of the defects mentioned in *Associated General Contractors*, *supra*. Pet. App. 36a-37a. The factors mentioned in that decision, however, simply persuaded the Court that the plaintiffs in that particular case lacked standing. The Court did not intimate that those factors were exclusive, and explicitly stated that "[a] number of other factors may be controlling" in determining whether a plaintiff has antitrust standing. 459 U.S. at 538.

United States' enforcement efforts and would impose on federal courts potentially burdensome and complex antitrust suits brought by plaintiffs around the globe based on transactions that took place overseas. See pp. 21-23, *supra*; cf. *Associated General Contractors*, 459 U.S. at 545 ("massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits"). Those considerations, and the fact that such suits are far removed from the core policy of the antitrust laws to protect commerce in the United States, establish that respondents lack standing to invoke the treble damages remedy of Section 4 of the Clayton Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2004

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* The Solicitor General is recused in this case.
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No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE INTERNATIONAL CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs, five foreign companies that purchased goods outside the United States from other foreign companies, may pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE COURT OF APPEALS INAPPROPRIATELY IGNORED THE FOCUS OF THE FTAIA'S LANGUAGE AND STRUCTURE ON REGULATING ONLY TRANSACTIONS THAT AFFECT U.S. COMMERCE.	8
II. THE COURT OF APPEALS' INTERPRETATION OF THE FTAIA WOULD MAKE THE UNITED STATES THE REGULATOR OF COMPETITION IN THE WORLD'S MARKETS, CONTRARY TO CONGRESS' INTENT.	12

Contents

	Page
III. THE DECISION OF THE COURT OF APPEALS CREATES UNCERTAINTY AND THE POSSIBILITY OF CONFLICTING REGULATION FOR BUSINESSES IN INTERNATIONAL COMMERCE, AND IS NOT ADMINISTRABLE AS A JURISDICTIONAL TEST.	20
CONCLUSION	24

TABLE OF CITED AUTHORITIES

Page

United States Cases:

In re Copper Antitrust Litigation, 117 F. Supp. 2d 875 (W.D. Wis. 2000), *rev'd, Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836 (7th Cir. 2003), *reh'g and reh'g en banc denied*, May 28, 2003 ..... 9, 11

Den Norske Stats Oljeselskap AS v. HeereMac VOF, 241 F.3d 420 (5th Cir. 2001) 8, 11, 18

Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003) 4, 8, 11

Ferromin International Trade Corp. v. UCAR International, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001) 11

Kruman v. Christie's International plc, 284 F.3d 384 (2d Cir. 2002) 3, 8

Kruman v. Christie's International plc, 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *rev'd*, 284 F.3d 384 (2d Cir. 2002) 9, 10

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 5, 12, 18

Murray v. The Charming Betsy, 2 Cranch 64, 2 L. Ed. 208 (1804) 20

Page

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 5, 12, 19

Weinberger v. Rossi, 456 U.S. 25 (1982) 20

United States Constitutional Provisions, Statutes And Treaties:

15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982) 3, 4, 8

Foreign Constitutional Provisions, Statutes And Treaties:

Monopoly Regulation and Fair Trade Act of Korea §§ 19(1), (2) 23

Legislative Authorities:

H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 ..... *passim*

Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong, 97th Cong. (1981) 13, 14

Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Comm. on the Judiciary, 97th Cong. (1981) 13

Cited Authorities

Page

Miscellaneous:

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) 19

I ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001) 23

No. 03-724

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F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE INTERNATIONAL CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

Amicus curiae The International Chamber of Commerce ("ICC") respectfully submits this brief in support of Petitioners, with the written consent of the parties.[1]

1. Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its counsel, or its members made a monetary contribution to this brief.

INTEREST OF THE AMICUS CURIAE

Amicus curiae ICC and its members have a vital interest in the issues raised by Petitioners.

The ICC is the world business organization representing thousands of companies, chambers of commerce and business associations in 130 countries. Its mission is to promote multilateral trade among nations in the interest of global prosperity and peace. Among other functions, the ICC promotes voluntary rules governing the conduct of business across borders that are observed in countless thousands of transactions every day; provides essential trade-related services such as the ICC International Court of Arbitration, the world's leading arbitral institution; and consults on issues of international trade for the United Nations and its specialized agencies. Business leaders and experts drawn from the ICC membership establish business stances on broad issues of trade and investment policy as well as on vital technical and sectoral subjects.

The decision of the Court in this case is likely to have far-reaching repercussions for *amicus* and its members in the daily conduct of their business. The question of whether purely non-U.S. transactions, involving no U.S. buyers or sellers, could be subject to the antitrust jurisdiction of U.S. courts in civil actions—and thus the possibility of wide-ranging civil discovery, use of the class action mechanism, and the imposition of treble damages—is of critical importance to businesses engaging in international trade. Until recently, it seemed beyond question that U.S. antitrust laws would have no application to transactions not having the requisite anticompetitive effects on U.S. commerce. If, however, the Court upholds the decision of the Court of

Appeals, international businesses will have to rethink completely their manner of doing business and their potential exposure under U.S. antitrust law, even though the U.S. market is not involved in the transactions in question—without any clear and simple guidelines for doing so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The international business community, including *amicus* and its members, is deeply troubled by the expansive approach to extraterritorial U.S. antitrust jurisdiction adopted by the Court of Appeals in this case, as well as the similar holding by the Court of Appeals for the Second Circuit in *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002). That approach would, in essence, subject virtually every transaction in an allegedly "international" industry to the regulation of United States laws and courts—no matter where that transaction took place, regardless of the nationality of the seller and purchaser, and regardless whether another inconsistent, or even conflicting, competition regime also applied to the same business transaction. For non-U.S. businesses in particular, most of whom have never expected U.S. antitrust laws to apply to their wholly foreign transactions and would need to invest considerable resources in researching and understanding the implications of those laws, this approach, if endorsed by this Court, would impose burdens, and a level of complexity and uncertainty, of unprecedented scope.

The Court of Appeals' interpretation of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA"), holds that if a plaintiff alleges that a *single* person—even one whose claims are not before the court—could assert a "claim" arising from a "direct, substantial, and

reasonably foreseeable effect" on U.S. domestic or foreign commerce, *any person* alleging injury from *any transaction* in *any market* throughout the world can bring suit in U.S. courts, under U.S. antitrust laws, so long as their purported injuries arise from the same "conduct"—a term given broad construction by the Court of Appeals and by Respondents.[2]

Amicus wishes to provide the Court with its perspective on how this incorrect interpretation of the FTAIA conflicts with the plain language of the FTAIA, as well as important principles that guided Congress in enacting this statute.

First, the language and structure of the FTAIA demonstrate a focus on regulating only "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on *U.S.* commerce *and* that "gives rise to a claim" under the Sherman Act. 15 U.S.C. §§ 6a(1), (2). This language simply does not support the view of the Court of Appeals majority that "conduct" not meeting these criteria—*i.e.*, the wholly foreign transactions at issue in this case, which neither had an "effect" on U.S. commerce nor give rise to a Sherman Act "claim" by Respondents—is nonetheless relevant "conduct" for purposes of the statutory analysis. Rather, the statute requires a focus on the *particular transactions* at issue

2. *See Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003):

> We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive effect itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff before the court.

in the case and whether they meet the requirements of Subsections 1 and 2 of the FTAIA.

Second, Congress recognized the rights of foreign nations to regulate the conditions of competition in their own markets, and indeed the importance of their doing so. This recognition accords with the basic principle of U.S. antitrust jurisdiction that "American antitrust laws do not regulate the competitive conditions of other nations' economies,"[3] and with basic international law limitations on Congress' jurisdiction to prescribe laws with extraterritorial effect—limitations which Congress must be presumed to have respected. The Court of Appeals' interpretation of the FTAIA, however, would make the United States the *de facto* regulator of competition in a vast proportion of international business transactions, even where its own market is not involved in those transactions.

Businesses engaging in international commerce must regularly make decisions and business arrangements that contemplate transactions in markets throughout the world. Businesses view their "conduct" as distinct with respect to each market in which business is transacted, and look to the domestic law governing each market to guide and govern their behavior. However, under the Court of Appeals' interpretation of the FTAIA, a company's transactions in disparate markets can easily and inappropriately be lumped together as constituting the same "conduct." In the modern global economy, where markets throughout the world are typically interrelated, allegations of a "worldwide market" or a "worldwide conspiracy" can be made with respect to

3. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), *citing United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416, 443 (2d Cir. 1945).

virtually any major product or service—and are in fact routinely made by plaintiffs in U.S. antitrust actions involving international markets. However, both from the perspective of Congress' purpose to regulate only restraints of trade with "direct, substantial, and reasonably foreseeable effects" on *U.S. commerce*, and from the realities of how businesses conduct international commerce, the appropriate analysis is the one dictated by the language and structure of the FTAIA—a focus on the particular business transactions that purportedly gave rise to the plaintiffs' claim.

Finally, in enacting the FTAIA Congress sought to adopt a clear and uniform jurisdictional standard that would serve as a benchmark for "businessmen, attorneys and judges as well as our trading partners."[4] Yet the decision of the Court of Appeals would create *uncertainty* for international businesses, who would face the prospect that transactions with no relationship to the United States—transactions which heretofore seemed to have no plausible connection to U.S. competition law—might be judged against complex U.S. antitrust standards, including in some cases a full-blown "rule of reason" analysis. Moreover, U.S. civil actions regarding such transactions would require the parties and the courts to engage in complex and expensive litigation, including burdensome discovery, regarding issues that require an analysis of the competitive conditions of foreign markets. Congress did not intend U.S. courts, and parties to U.S. lawsuits, to expend their resources making determinations on issues far more suited to the courts and laws of the jurisdictions that were directly impacted by the transactions at issue.

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4. H.R. Rep. No. 97-686 (1982), *reprinted at* 1982 U.S.C.C.A.N. 2487, at 2488.

Accordingly, *amicus* urges the Court to reverse the decision of the Court of Appeals.

ARGUMENT

The Court of Appeals majority incorrectly based its ruling that the foreign transactions at issue in this case are within the subject matter jurisdiction of U.S. antitrust laws and courts on an overly broad view of the relevant "conduct"—*i.e.*, "an international price-fixing conspiracy among the vitamin companies," as well as *every single sales transaction worldwide* purportedly affected by that conspiracy. However, this view conflicts with the language of the FTAIA; with Congress' manifest purpose to regulate only conduct with "direct, substantial, and reasonably foreseeable effects" on U.S. commerce, so that U.S. laws and courts do not become the regulators of competition in all the world's markets; and with the way that businesses in international commerce normally view their own "conduct" and anticipate the competition laws that will apply to that conduct. Consistent with these principles, the natural and correct reading of the FTAIA is that courts should focus on the *particular transactions* that allegedly gave rise to the injuries of which plaintiffs in the case in question complain.

I. The Court Of Appeals Inappropriately Ignored The Focus Of The FTAIA's Language And Structure On Regulating Only Transactions That Affect U.S. Commerce.

The Court of Appeals majority dispensed with the critical issue of the "conduct" relevant to its jurisdictional analysis under the FTAIA in a single paragraph. Purporting to follow the views of the Second Circuit in *Kruman*[5] and the Fifth Circuit in *Den Norske*,[6] the majority agreed with Respondents that the relevant conduct was the alleged "massive international cartel, exercising global market power." *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003).[7] The majority accepted, without analysis, that this "conduct" had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, thus meeting the requirements of Subsection 1 of the FTAIA. *Id.*; 15 U.S.C. § 6a(1). The majority concluded that the only remaining issue was to determine whether the requirements of Subsection 2 of the FTAIA were met, *i.e.*, whether "such effect gives rise to a claim" under the substantive provisions of the Sherman Act. 315 F.3d at 344; 15 U.S.C. § 6a(2). According to the majority, the requirement of Subsection 2 is satisfied if the "conduct's harmful effect on United States commerce . . . give[s] rise to 'a claim' by someone, even if not the foreign plaintiff before the court." 315 F.3d at 341.

5. *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003).

6. *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

7. In so holding, the majority dismissed Petitioners' contention that the relevant conduct was "solely the market transactions between them and the foreign plaintiffs overseas." 315 F.3d at 344.

The majority's analysis conflicts with the structure and language of the FTAIA. Subsections 1 and 2 of the FTAIA *define* the "conduct involving trade or commerce . . . with foreign nations" to which the Sherman Act applies. Subsection 1 of the FTAIA specifies that this conduct must have had the requisite effect on U.S. commerce. As the district court observed in the *Copper* case, the statute "is explicit in stating that it is the *effect* of the conduct that is the focus of Congress's concern."[8] In addition, Subsection 2 specifies that it is the Sherman Act *claim* that forms the basis of the FTAIA's jurisdictional test. Reading the FTAIA as a unified whole, the statute's concern is with reaching "conduct" that satisfies both of these criteria. It is simply inconsistent with this language to read the relevant "conduct" as encompassing a purported "international cartel" without reference to the *particular business transactions* that purportedly gave rise to the "effect" on U.S. commerce and the "claim" at issue in the case. It is even more erroneous to conclude, as the Court of Appeals did, that transactions that had *no* effect on U.S. commerce, and gave rise to *no* Sherman Act claim, nonetheless constituted relevant "conduct."

In the district court opinion in *Kruman*, Judge Kaplan explained persuasively that the word "conduct" in the opening clause of the FTAIA must be read with reference to "[t]he precise acts that caused injury" in the case, *i.e.*, "the imposition of charges for auction services at levels determined or affected by the illicit agreement." *Kruman v. Christie's Int'l plc*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001), *rev'd*, 284 F.3d 384 (2d Cir. 2002). Judge Kaplan held that a

8. *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 883 (W.D. Wis. 2000), *rev'd*, *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 840 (7th Cir. 2003), *reh'g and reh'g en banc denied*, May 28, 2003.

broad reading of "conduct," without reference to the plaintiff's injury, would obscure "the real issue"—*i.e.*, whether U.S. antitrust laws provided a remedy for the injuries in *that case*. *Id.* at 625-26. On the facts before him, Judge Kaplan held that the FTAIA did *not* permit a remedy in U.S. courts, under U.S. laws, for those injuries, because the "precise acts" giving rise to those injuries did not relate to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce:

> [I]t would be appropriate for the United States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonably foreseeable effects here that caused the injuries to be remedied.

Id. at 626.[9]

The Fifth Circuit, as well as the dissenting opinion in this case by Judge Henderson, used different reasoning to reach a conclusion consistent with Judge Kaplan's view. Rather than focusing on the identity of the relevant "conduct," these interpretations focused on the meaning of the term "claim" in subsection 2. Judge Henderson correctly concluded that the "more natural" reading of the statute is

9. Judge Kaplan viewed this interpretation as "a straight forward application of the fundamental notion, widely respected by U.S. courts, of prescriptive jurisdiction." 129 F. Supp. 2d at 626. He stated that "[t]he power of the United States to prescribe a rule of conduct for extraterritorial transactions, its prescriptive jurisdiction, depends . . . on those transactions having a substantial effect within U.S. territory." *Id.*

that "the phrase 'gives rise to a claim' refers to the claim advanced by the plaintiff in the action before the court." 315 F.3d at 360 (Henderson, J., dissenting). Similarly, the Fifth Circuit in *Den Norske* held that "the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'give rise' to the claim." 241 F.3d at 427. Each of these analyses mandates that the court focus on the precise claims at issue in the case and the transactions and purported injuries relating to those claims. If those claims do not relate to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by Subsection 1 of the FTAIA, there is no U.S. subject matter jurisdiction.

The views of Judge Kaplan, Judge Henderson, and the Fifth Circuit—as well as other district courts that have interpreted the FTAIA[10]—are complementary, and are more faithful to the language and intent of the statute than that of the majority in this case. Whether the issue is tied to the definition of "conduct" or the meaning of the word "claim," both approaches recognize that the jurisdictional test of the FTAIA must relate to the transactions that allegedly injured the plaintiff *before the court*. The analysis must take into account whether *that* "conduct" relates to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and whether *that* "conduct" gives rise to a "claim." Failure to test that "conduct"—those transactions—against the requirements of the FTAIA would ignore the clear purpose of Subsections 1 and 2: to determine what "conduct" is subject to the Sherman Act, and what is not.

10. *See Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704-07 (E.D. Pa. 2001); *Copper*, 117 F. Supp. 2d at 883.

II. The Court Of Appeals' Interpretation Of The FTAIA Would Make The United States The Regulator Of Competition In The World's Markets, Contrary To Congress' Intent.

The view of the Court of Appeals majority is not only inconsistent with the language of the FTAIA, it also conflicts with the fundamental tenet of U.S. antitrust jurisdictional analysis that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), *citing United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416, 443 (2d Cir. 1945). Congress clearly recognized this principle and incorporated it into the FTAIA. However, if the ruling of the Court of Appeals is allowed to stand, the United States will indeed become the regulator of the competitive conditions of markets throughout the world. That result would impose a massive burden on international businesses, would raise havoc with the antitrust regimes enacted by some 75-100 of the United States' trading partners and allies in recent years, and in fact would likely exceed the limits of Congress' jurisdiction to prescribe laws affecting the interests of other nations.

In enacting the FTAIA, Congress did not set out to transform U.S. antitrust law into a competition regime for the entire world. To the contrary, one of the two basic purposes of the FTAIA was to clarify *and limit* which business transactions were subject to the jurisdiction of U.S. laws and courts. The House Report states unambiguously that "[t]he intent of the Sherman and FTC Act amendments in H.R. 5253 is to *exempt* from the antitrust laws conduct that does not have the requisite domestic effects." 1982 U.S.C.C.A.N. at 2495 (emphasis added). The same

section of the House Report emphasized that victims of *U.S. domestic* price-fixing, whether domestic or foreign, should be able to recover for their injuries—thus, "[f]oreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do." *Id.* at 2495 (emphasis added). But with respect to foreign markets, the report acknowledged the "increased sensitivity of other nations to antitrust considerations and cartel activity" and the need to "encourage our trading partners to take more effective steps to protect competition in their markets." *Id.* at 2499.

Testimony throughout the legislative process emphasized the need to respect principles of international comity and restrain any overly aggressive extraterritorial effect of the antitrust laws. Chairman Rodino, one of the sponsors of the FTAIA in the House of Representatives, stated that it was important for Congress to consider legislation "that would provide greater certainty regarding the international scope" of U.S. antitrust laws because of resentment by "many of our closest allies and trading partners" regarding their extraterritorial reach.[11] Former Federal Trade Commission chairman Robert Pitofsky informed the U.S. Senate Judiciary Committee that the FTAIA would limit the subject matter jurisdiction of U.S. antitrust laws in a manner consistent with America's trading partners by recognizing that "transactions which exhaust their competitive consequences in foreign markets should be treated differently than those that have an internal domestic effect."[12] Professor Eleanor Fox told the House

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11. Comments of Hon. Peter W. Rodino, Jr. (chairman) at Hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 1.

12. Prepared statement of Robert Pitofsky, Esq. at hearing on S. 795 before the Comm. on the Judiciary, 97th Cong., June 17, 1981, at 45.

of Representatives that the proposed bill would make clear that "the U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries."[13] Professor Fox went on to state that "[w]hile protection of competition in foreign markets may be a worthy objective, it is not our concern. We do not, and should not seek, thus to export American antitrust."[14]

James R. Atwood emphasized in his comments to the House of Representatives that the FTAIA was intended to achieve a rational allocation of antitrust enforcement throughout the world's jurisdictions, based on the location of the markets in which the effects were felt.[15] David N. Goldsweig echoed these observations, testifying that competition law has developed in foreign jurisdictions throughout the world, including Japan, most European countries, Chile, and Korea, and that an amendment to U.S. competition laws such as the FTAIA "would limit unnecessary and unwanted intrusions into matters that should properly be resolved in accordance with the local law and policies of foreign sovereigns."[16]

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13. Testimony of Prof. Eleanor Fox at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 27.

14. *Id.*

15. Prepared statements of James R. Atwood, Esq. at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., April 8, 1981, at 92 (FTAIA "would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States").

16. Testimony of David N. Goldswieg, Esq. at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 36.

The FTAIA's legislative history confirms that, consistent with these principles and the plain language of the statute, Congress intended to regulate only *transactions* with the requisite "direct, substantial, and reasonably foreseeable" effects on U.S. commerce. This emphasis on "transactions," a term used throughout the House Report, is demonstrated in the following passage:

> A *transaction* between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign *transactions* should, for the purposes of this legislation, be treated in the same manner as export *transactions*—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.

1982 U.S.C.C.A.N. at 2494-95 (emphasis added).[17] Thus, Congress contemplated that the "effect" on U.S. commerce be related to the particular transaction giving rise to that effect. If the transaction does not have the requisite

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17. *See also, e.g.*, 1982 U.S.C.C.A.N. at 2487 (FTAIA addresses differences among courts regarding "the proper test for determining whether United States antitrust jurisdiction over international *transactions* exists"); *id.* at 2488 (FTAIA makes Sherman Act inapplicable "to conduct involving trade or commerce with foreign nations, other than import *transactions*, unless there is a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce, or the export opportunities of a domestic person."); *id.* at 2490 (FTAIA addresses "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular *transaction*"); *id.* (*Alcoa* test contemplated whether "the international *transaction* was intended to affect domestic commerce and whether it actually did so") (emphases added).

effect, in the words of the House Report, "there should be no American antitrust jurisdiction." *Id.*

This focus on whether a given *transaction* serves as a basis for the subject matter jurisdiction of U.S. courts is the analysis that best comports with Congress' emphasis on regulating conduct with effects on United States commerce, while permitting other nations to develop competition regulations with respect to their own markets. This analysis creates a logical allocation of enforcement responsibility: each jurisdiction is responsible for regulating the "conduct"—*i.e.*, the affected transactions—that have a direct impact on that jurisdiction's markets.

This analysis also corresponds most closely to how businesses view their "conduct" with respect to international commerce, and the competition regimes they expect will apply to their conduct. In a global economy, with the world's markets frequently interlinked and interdependent, businesses often make high-level decisions, agreements, and other actions that account for multiple markets at once. For example, distribution arrangements may fix terms on which a distributor can resell goods in numerous countries. Licensing agreements may cover royalties and other fees in multiple markets. Supply agreements may contemplate the provision of goods from several countries. On a very basic level, a manufacturer—such as Petitioners in this action—may sell goods to multiple countries.

This does *not* mean that a company that does business in multiple countries is engaging in the same "conduct" with respect to each of them. International businesses *always* seek to be aware of differences in their target markets that will have an impact on their business. Such differences can

include competitive conditions, such as whether the market will support higher or lower prices; costs of doing business, such as taxes, fees, and duties; and the applicable regulations—including antitrust laws. These distinctions may warrant differing prices, contract terms, distribution methods, etc. from market to market, and they may not; but separate markets would normally receive individual consideration. From a business perspective, the only logical way to gauge participation in each market is with respect to the specific business transacted in each of them. Similarly, the only practical way for a business to understand the rules that will apply to its conduct in varying markets is by reference to its actual business conducted in each market—namely, the transactions that affect it.

Once the concept of "conduct" is divorced from specific, identifiable business transactions—as the Court of Appeals majority has done in this case—and broadened to the generalized level of global strategic planning, it is possible for nearly any plaintiff involved in international trade to argue that some aspect of a defendant's business planning was global in nature and contemplated business involving the U.S. market. From there, it is but a small step for such a plaintiff to allege that some aspect of that global "conduct" had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, giving rise to a "claim" of someone, somewhere. Indeed, such allegations are now routine in antitrust cases involving alleged international cartels. If such allegations were sufficient to invoke the antitrust subject matter jurisdiction of U.S. laws and courts, this would have precisely the opposite effect of what Congress intended by enacting the FTAIA. It would *extend* jurisdiction to the very conduct that Congress meant to *exempt*—transactions that do not give rise to a "claim" arising from a "direct,

substantial, and reasonably foreseeable effect" on *U.S.* domestic or foreign commerce.

Respondents have placed emphasis on the "global" nature of the vitamins market and of the price-fixing cartel they allege. Respondents' Brief in Opposition to Petitioners' Petition for Writ of Certioriari at 2-5. In essence, this is another way of arguing for the broadest possible view of the "conduct" that Congress sought to regulate. Again, similar characterizations could be made with respect to a vast array of goods and services that are traded internationally, and it is common for plaintiffs to make boilerplate allegations of a "global market" and/or a "global conspiracy" in antitrust cases. However, even where the legislative history of the FTAIA makes reference to "International Cartels," the focus is on addressing such a cartel's "effect of raising domestic prices." 1982 U.S.C.C.A.N. at 2498. Where a cartel has unlawful effects in a foreign territory, the legislative history contemplates encouraging our trading partners to "act under [their] own laws" and "protect competition in their markets." *Id.* at 2498-99. There is certainly no hint of an intention for U.S. courts and U.S. laws to regulate, and provide remedies for, transactions that do not have the requisite effects on *U.S.* commerce—even with respect to a purportedly "global" market or conspiracy. As the Fifth Circuit recognized in *Den Norske*, "[t]he assumed existence of a single, unified, global conspiracy does not relieve [plaintiff] of its burden of alleging that its injury arose from the company's proscribed effects on United States commerce." 241 F.3d at 427 n.24, *citing Matsushita*, 475 U.S. at 584 n.7.

Congress' intention that foreign jurisdictions regulate their own markets in the case of "international cartels" is also consistent with the canon of statutory construction that,

as Judge Hand observed in *Alcoa*, "we are not to read general words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers." *Alcoa*, 148 F.2d at 443. Consistent with this well-established principle, the jurisdiction of Congress to prescribe laws in circumstances affecting the interests of other states is subject to the requirement that such jurisdiction must be "reasonable."[18] *Amicus* wishes to emphasize the *unreasonableness* of the Court of Appeals' interpretation of the FTAIA by considering how the U.S. would view a similar assertion of subject matter jurisdiction by other countries.

If U.S. businesses were haled into foreign courts in connection with treble-damage class action lawsuits under foreign law concerning product sales that took place entirely within the United States, involving a U.S. buyer and a U.S. seller, the domestic business community and this nation's political leadership would take vigorous exception. More extreme possibilities present themselves: in an industry where products are sold throughout the world, U.S. (and foreign) businesses could find themselves facing litigation regarding those same U.S. transactions in dozens of courts throughout the world. Indeed, those U.S. businesses could face liability for those transactions under foreign laws *even if they were considered legal under U.S. law*. Under the approach followed by the Court of Appeals, courts in each of those countries would only have to satisfy themselves that some transaction with a "direct, substantial, and reasonably foreseeable effect" on that country's commerce gave rise to a "claim" under that country's laws.

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18. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

If that scenario would violate the principle of "reasonableness" under international law—and there is every reason to think that it would—the Court of Appeals' interpretation of the FTAIA would do so as well. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). Under this principle, the interpretation of the Court of Appeals majority should be rejected.

III. The Decision Of The Court Of Appeals Creates Uncertainty And The Possibility Of Conflicting Regulation For Businesses In International Commerce, And Is Not Administrable As A Jurisdictional Test.

The Court of Appeals majority's interpretation of the FTAIA also conflicts with another basic Congressional purpose in enacting that statute. Congress intended the statute to provide "a clear benchmark" for "businessmen, attorneys and judges as well as our trading partners." 1982 U.S.C.C.A.N. at 2488. The legislative history emphasizes that such clarity is necessary:

> First, as a practical matter, businessmen and antitrust practitioners often consider American antitrust law an unnecessarily complicating factor in a fluid environment in which prompt decisionmaking may be critical. . . . A single, clear standard can reduce the amount of legal research and analysis that will be necessary to make an

> accurate prediction to whether United States antitrust laws 'indicate problems.'

Id. at 2491. Congress recognized that this need also extended to the administrability of court proceedings. The legislative history states that "[a] single standard will allow consistent precedent to develop by providing more definite touchstones to guide the parties and the courts." *Id.*

Notably, Congress recognized that principles serve the needs not only of U.S.-based businesses and courts, but also of "our trading partners" and "the parties" in Federal court actions. Thus, foreign entities such as *amicus* ICC and its members are expressly within the group that Congress sought to benefit by enacting a clear, consistent standard under the FTAIA.

From the perspective of businesses involved in international trade, the Court of Appeals' interpretation of the FTAIA is emphatically not clear, not consistent, and not administrable as a jurisdictional test. In fact, this standard appears to require businesses considering whether to engage in international business transactions to navigate all the complexities of U.S. antitrust analysis—possibly requiring as-yet-unknown facts—to determine whether some person could, potentially, assert a "claim" arising from a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Moreover, if it is determined that such a "claim" might be possible, businesses would then apparently need to analyze whether their conduct in *every market in which they sell* complies with *U.S.* antitrust law. The requirement of such an analysis would be just the kind of "unnecessarily complicating factor" in making business decisions that Congress sought to prevent by passing the FTAIA—

particularly for foreign-based businesses, such as the members of *amicus* ICC, for whom parsing the nuances of federal antitrust law presents a particular challenge.

Furthermore, the jurisdictional test adopted by the Court of Appeals would be exceedingly difficult to administer in the context of an actual dispute. U.S. courts, and parties to actions in those courts, would be required to litigate such complex issues as:

- What person is alleged to have a "claim" arising from a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce;

- Whether and how the validity of that "claim"—which might involve only persons not before the court—can be established;

- Whether there is a sufficient relationship between that "claim" and the foreign transactions at issue in the case;

- Whether the "conduct" with respect to the *foreign market* constitutes an "unreasonable" restraint of trade under *U.S.* laws;

- Whether the "fact of injury" could be established with respect to the plaintiff *in the foreign market*; and

- If so, the appropriate measure of damages *in the foreign market*.

It would mark a radical departure from prior Sherman Act jurisprudence for U.S. courts to be required to make such determinations about the competitive conditions of foreign nations regarding purely foreign transactions. The complexity of such determinations also would do nothing to assist international businesses in determining whether U.S. antitrust law might apply to a given transaction. Indeed, the only thing it *would* ensure is that foreign businesses can and will be haled into U.S. courts based on allegations that might be made in nearly any industry involving international trade. This would frustrate, not further, Congress' purpose to clarify the extraterritorial reach of U.S. antitrust laws.

Finally, the Court of Appeals' interpretation of the FTAIA would create inconsistencies in markets throughout the world, because it could in some cases subject different actors in the same market, at the same time, to significantly differing legal standards. While many jurisdictions throughout the world have borrowed some concepts and standards from U.S. antitrust law, no jurisdiction has adopted the U.S. competition regime wholesale. Acts that are prohibited under U.S. competition laws may be permitted under the laws of another country.[19] Under the Court of Appeals' interpretation of the

19. To take one example, the Republic of Korea's prohibitions against "Unfair Collaborative Acts," set forth in Article 19(1), are subject to numerous exceptions under Article 19(2), including actions "authorized as satisfying the requirements determined by Presidential Decree" where conducted for the purpose of "1. Industry rationalization; 2. Research and technology development; 3. Overcoming economic depression; 4. Industrial restructuring; 5. Rationalization of trade terms and conditions; or 6. Enhancement of competitiveness of small and medium enterprises." Monopoly Regulation and Fair Trade Act of Korea §§ 19(1),(2), *available at* <http://ftc.go.kr/data/hwp/monopoly.doc>; *see also* I ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001), at 38.

FTAIA, a company whose "conduct," broadly defined, had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce giving rise to some "claim" would be subject to *U.S.* antitrust laws with respect to its transactions throughout the world. By contrast, a competitor participating in those same markets, but whose "conduct" did not have the requisite effects on U.S. commerce, would presumably be regulated only by the laws of the jurisdictions in which they transacted business, not the laws of the U.S.

The text and history of the FTAIA contain no suggestion that Congress expected different actors in the same market to be subject to differing competition regimes. Rather, the opposite is true: the FTAIA's provisions concerning exports were enacted to assure U.S. companies that they *would not* be subject to potentially stricter U.S. antitrust laws when they were conducting business in foreign markets, which could place those companies at a disadvantage compared to companies they are competing with not subject to U.S. law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 03-6821

IN THE

Supreme Court of the United States

DAVID NELSON,

Petitioner,

—v.—

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF LAURIE DILL, M.D., FRANK GOGAN, M.D., GARY KALKUT, M.D., MARK C.D. MITCHELL, M.D., JANE MOBLEY, M.D., & WILLIAM WINTERNITZ, M.D. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
STATEMENT	2
ARGUMENT	3
1. The Cut-Down Procedure is an Invasive Surgical Procedure That Requires Appropriate Safeguards	4
2. Less Intrusive and Safer Procedures Are Available	7
3. The Record Fails To Show That A Suitable Plan Is In Place Or That Appropriate Alternatives Have Been Considered	8
4. The Record Does Not Establish That Dr. Sonnier Is Competent To Perform Cut-Down	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: PAGE

Barrette v. Hight, 230 N.E. 2d 808 (Mass. 1967)..... 6

Crawford County State Bank v. Grady, 514 N.E. 2d 532 (Ill. App 4 Dist. 1997)..... 6

Edwards v. Our Lady of Lourdes Hosp., 526 A. 2d 242 (N.J. Super. A.D. 1987)..... 6

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Gray's Anatomy (Carmine D. Clemente ed; 30th ed. 1989) 9

David C. McGee, M.D., and Michael K. Gould, M.D., *Preventing Complications of Central Venous Catherization*, 348 N. ENGL. J. MED. 1123, 1128 (2003)... 5

Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 808 (1992)..... 7, 8

PAGE

Tracey Tay, *Venous Cutdown*, *in* The LIVERPOOL HOSPITAL MANUAL OF TRAUMA CARE (Scott K. D'Amours et al. eds., 6th ed. 2002) 7

Venous Cut Down: A Quicker and Safer Technique (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm> 5, 8, 9

INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a medical doctor.[2] Our practices require us to be familiar with current practices in obtaining intravenous access, including the surgical procedures necessary to gain access to central veins.

The underlying dispute in this matter concerns the State of Alabama's intent to utilize a medical procedure known as a "cut-down" in a non-surgical setting in order to gain access to a functional vein, and thus enable the Petitioner's execution by lethal injection. We understand that the Court is concerned principally with how a challenge to such a procedure may be brought, and we offer no view on that question. We do, however, write briefly to set forth current medical standards for gaining intravenous access in individuals who have compromised veins.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk.

[2] Laurie Dill, M.D., practices internal medicine in Montgomery, Alabama, and has been a physician for 17 years. Frank Gogan, M.D., has practiced general medicine in Montogmery, Alabama, and has been a physician for 23 years. Gary Kalkut, M.D., has practiced internal medicine in New York City for 20 years, and has several years of experience in providing medical services to prisoners. Mark C.D. Mitchell practices emergency medicine in Daphne, Alabama, and has been a physician for 21 years. Jane Mobley practices internal medicine in Birmingham, Alabama, and has been a physician for 17 years. William Winternitz practices internal medicine in Tuscaloosa, Alabama, and has been a physician for 26 years.

STATEMENT

This matter arises from an order of the Alabama Supreme Court that the Petitioner, David Nelson, be executed by lethal injection. In the weeks leading up to Nelson's October 9, 2003 execution date, the parties became aware that Nelson's poor vein structure made peripheral venous access in his hands and arms impracticable. Thereafter, the Warden of Holman Prison informed Nelson and his counsel that in order to gain adequate access, the State would attempt a cut-down procedure to locate an adequate vein in Nelson's upper thigh or arm.

Shortly before the scheduled execution, Nelson filed the instant suit, asserting that the State's employment of a cut-down procedure, in a prison setting, and under the circumstances outlined by the Warden, was both reckless because of the irresponsible manner in which the State was proposing to conduct the procedure, and unnecessary because of less painful, less traumatic and safer alternatives.

Nelson supported his claims with the affidavit of a Board Certified anesthesiologist, Mark Heath, M.D. Dr. Heath asserted the cut down is a potentially risky surgical procedure. He described the procedure as painful and disturbing, specifically the smoke, odor, as well as the buzzing and sizzling noises that can result from cautery. JA 32. Dr. Heath indicated that cut-down procedures are usually performed under deep sedation, with the administration of potent intravenous analgesics (drugs that block pain), because otherwise they would be extraordinarily disturbing and distressing. *Id.* Finally, he asserted that a cut-down procedure is a procedure that should be performed only by a physician or practitioner who is specifically trained and credentialed to perform that procedure. JA 32-33. Moreover, given the near uni-

versal adoption of superior techniques, Dr. Heath explained there is no comprehensible reason for the State of Alabama to employ the cut-down procedure to obtain intravenous access. JA 37.

The State countered with affidavits from the Warden and a medical doctor, Marc Sonnier. J.A. 90-94. The Warden explained that the State was now prepared to use the cut-down procedure in the event that access to veins in the thigh and neck proved unavailable, and that an unidentified medical doctor would perform any of the needed procedures. J.A. 93-94. He further stated that if the cut-down procedure was utilized, Nelson would be given local anesthesia. J.A. 94. Dr. Sonnier explained that he was familiar with each procedure outlined by the Warden and that none of the procedures, if performed in the prison setting, would pose any significant risk to Nelson. J.A. 90-91.

The parties disagree profoundly upon the nature of the cut-down procedure and adequacy of the state's plan to employ it. We offer this brief to advise the Court on these areas of dispute.

ARGUMENT

From our experience and training, the disputed issues do not present close questions. The Petitioner has fully and fairly described how current medical practice views the appropriate use of cut-down procedures, and why the State's hastily assembled plan to utilize it is sharply inconsistent with such practice.

1. The Cut-Down Procedure is an Invasive Surgical Procedure That Requires Appropriate Safeguards

The cut-down procedure is an accepted medical procedure when conducted in the correct setting, by a properly trained physician, and where less intrusive procedures are unavailing. "Venous cutdown is contraindicated when less invasive alternatives exist or when excessive delay would be required for the procedure to be performed." Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

"Performance of a rapid, effective cutdown can be achieved only by thorough knowledge of the procedure and attention to its many details." *Id.* There are a host of reasons why cut-down must be performed in the correct setting, and by an adequately trained physician. The ultimate objective of the procedure is to go deeply into an arm, leg, or chest to locate large, uncompromised veins. "Detailed knowledge of anatomy is imperative to the success of this procedure." *Id.* Moreover, "[t]he choice of a particular vein should be governed by its accessibility and size and by the physician's experience and training." *Id.* Skill and practice are especially important in cut-down procedures, because they require cutting through tissue, fat, and muscle; such deep invasion breaches small arteries and causes bleeding.

Given the nature of the procedure, there are numerous possible complications that the physician must take precautions to avoid. *See id.* Whenever deep incisions are made, there is a clear risk of rupturing large blood vessels. Such a breach can cause a severe hemorrhage. When the procedure is used in the neck area, two additional risks arise: cardiac dysrhythmia, an abnormality of

the electrical activity of the heart, and pneumothorax, which induces the sensation of suffocation. *See Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm>. Cutdown also causes significant physical pain and obvious psychological and emotional stress. "An indirect but significant complication is deterioration of an unstable patient during a time-consuming cutdown attempt." Steven C. Dronen and Patricia Lanter, *supra.*

Because of these and other risks,[3] it is necessary that this procedure take place in a hospital or otherwise appropriate medical setting. All of the complications that can arise require ready access to equipment found only in the hospital setting, and to trained staff who can competently assist the physician.[4] In the absence of sufficient, qualified, available staff and other doctors, a physician would lack the assistance necessary to deal adequately with complications as they arose.

It is also accepted practice that cut-down procedures should be performed by physicians who have specialized

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[3] The complications of venous cut-down include local hematoma and infection, sepsis, phlebitis, embolization, wound dehiscence, and injury to associated structures. Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

[4] For instance, acceptable protocol requires that "[i]f a physician is unable to insert a catheter after three attempts, he or she should seek help rather than continue to attempt the procedure. The incidence of mechanical complications after three or more insertion attempts is six times the rate after one attempt." David C. McGee, M.D., and Michael K. Gould, M.D., *Preventing Complications of Central Venous Catherization*, 348 N. ENGL. J. MED. 1123, 1128 (2003).

training in the area.[5] "As with most medical procedures, the level of experience of the physician reduces the risk of complications." McGee and Gould, at 1128. This is not a procedure that all physicians would feel comfortable performing, and the risk of complication or error is significantly lessened when skilled, trained physicians perform the procedure.[6] "[Even] insertion of a catheter by a physician who has performed 50 or more catherizations is half as likely to result in a mechanical complication as insertion by a physician who has performed fewer than 50 catherizations." McGee and Gould, at 1128.

Moreover, to lessen the pain, trauma and anxiety of the patient, it is also accepted practice that a general anesthesia or deep sedation be utilized. Many, if not most patients are profoundly traumatized by the sight of copious amounts of their own blood, and by the pungent odors that arise from such procedures as cautery.

We believe that any competent physician, if asked to support the State's plan to resort to the cut-down under the instant conditions—without the guarantee of adequate equipment, a certified and trained practitioner to perform

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[5] Emergency medicine, surgery, anesthesiology and cardiology are the four areas of medicine most likely to provide doctors with experience in cut-down procedure. Doctors outside of these specialties may well have never performed a cut-down.

[6] Case law includes numerous examples of how inexperience and lack of skill in cut-down procedure can lead to devastating pain and suffering in patients. *See, e.g., Crawford County State Bank v. Grady*, 514 N.E. 2d 532 (Ill. App 4 Dist. 1997) (multiple cut downs on leg cause swelling and eventual gangrene in foot; foot is later amputated); *Edwards v. Our Lady of Lourdes Hosp.*, 526 A. 2d 242 (N.J. Super. A.D. 1987) (after cut down, inexperienced physician inserts catheter in artery, not vein; right leg is later amputated at the hip after gangrene develops); *Barrette v. Hight*, 230 N.E. 2d 808 (Mass. 1967) (during cut down by inexperienced doctor, lateral nerve in arm is severed and median nerve is damaged).

the procedure, licensed medical support staff, and a surgical environment, and without having first ruled out the safer, far less painful preferred procedures—would refuse. For all of the foregoing reasons, a cut-down procedure should not be utilized in a prison environment unless it is fully equipped to provide safe surgery.

2. Less Intrusive and Safer Procedures Are Available

Modern medicine provides the State of Alabama with plainly superior options. Indeed, we believe most trained physicians, in the absence of normal peripheral venous access, would only resort to a cut-down after definitively ruling out the other, safer, less invasive procedures.

These preferred procedures are well established. "[A] method of rapid fluid infusion that is technically easier and faster than venesection is the percutaneous insertion of large-bore introducer devices into the subclavian, internal jugular, or femoral veins." Steven C. Dronen and Patricia Lanter, *Venous Cutdown, in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998). "Venous cutdown is only indicated where more rapid and less invasive venous access is not obtained. Options include cannulation of the femoral vein or neck veins . . . ." Tracey Tay, *Venous Cutdown, in* The LIVERPOOL HOSPITAL MANUAL OF TRAUMA CARE (Scott K. D'Amours et al. eds., 6th ed. 2002). Medical professionals throughout the country are familiar with these preferred procedures, the most common of which, percutaneous central line placement, utilizes a hollow needle and a wire to secure access. Because percutaneous techniques are far less invasive, they carry none of the risks of the cut-down procedure, and are far less painful, less traumatic, and easier for the physician to master. As a result, "[p]ercutaneous alternatives should be

exhausted or prohibited prior to contemplating a peripheral cutdown." Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 808 (1992).

3. The Record Fails To Show That A Suitable Plan Is In Place Or That Appropriate Alternatives Have Been Considered

While the record shows that Nelson requested the State's plan for addressing Nelson's condition, and asked that it consider alternatives to the cut-down procedure, the record strongly suggests that no suitable plan exists and that no such consideration was given. The Warden's affidavit explains clearly that the State's plan, which does not include percutaneous central line placement, was conceived after Nelson brought the instant litigation, and that as yet unnamed medical personnel are prepared to carry out the procedures. J.A. 90-91.

There is nothing in this record that suggests that percutaneous central line placement would fail. Given this fact, there is no medical reason to utilize the significantly more dangerous cut down procedure.[7]

[7] "A peripheral venous cutdown is not the primary consideration in most patients who require vascular access. It is specifically indicated, however, in patients who lack adequate peripheral access *and* who are *not candidates for percutaneous central venous access*." Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 807 (1992) (emphasis added). "*If an intravenous line cannot be established percutaneously*, and *if a subclavian (or internal jugular) catherization is not appropriate* to the clinical situation, a venous cutdown is indicated . . . ." Sam C. Eggertsen, MD, *Teaching Venous Cutdown Techniques with Models*, 16 (6) J. FAM. PRACT. 1165, 1165 (1983) (emphasis added). "Venous cut down is an emergency procedure . . . [and an] effective option for venous access in multisystem trauma and hypovolemic shock, *when peripheral cannulation becomes difficult or impossible*." *Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm> (emphasis added).

4. The Record Does Not Establish That Dr. Sonnier Is Competent To Perform Cut-Down

Finally, while the Warden did not confirm that Dr. Sonnier would supervise or conduct the invasive procedures outlined in their affidavits, we note that there are significant reasons to question whether Dr. Sonnier possesses the requisite experience and training adequately and safely to perform a cut-down procedure. At no point does he describe his background and training in sufficient detail to establish that he possesses such training and experience. Our confidence in his experience is not strengthened by his claim that he has previously attached an intravenous line "to the external carotid vein located in the neck," and his assertion that the saphenous vein is in the arm. J.A. 91. Humans do not have an external carotid vein in their neck nor a saphenous vein in their arm. GRAYS ANATOMY, at 816-26; 845-50 (Carmine D. Clemente ed., 30th ed. 1984). Further, it appears that it was the Warden, and not Dr. Sonnier, who determined the procedures that would be used. The selection of a method to gain access to a non-compromised vein should be made by the doctor, and only after he or she has performed a full examination of the patient. There is no evidence that Dr. Sonnier has performed such an examination.

Conclusion

If a special medical procedure is necessary to locate a functional vein, the procedure should comply with accepted medical pra tice. The deficient plan proposed by the State of Alabama in this instance falls far short of those practices.

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IN THE
Supreme Court of the United States

F. HOFFMAN-LAROCHE LTD., *et al.*,
Petitioners,

v.

EMPAGRAN, S.C., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ANTITRUST VIOLATORS WHOSE ANTI-COMPETITIVE CONDUCT NEGATIVELY AFFECTS THE U.S. MARKET ARE LIABLE FOR ALL CLAIMS ARISING FROM THAT CONDUCT 5

A. Congress's Purpose in Enacting the FTAIA is Consistent With an Intent to Provide Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market 5

B. The Legislative History Demonstrates That Congress Intended to Establish Liability for All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market 9

C. Congress Amended the Bill to Clarify That Courts Have Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Pages**

Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001) 4, 12

Empagran v. F. Hoffman-LaRoche, Ltd, 315 F.3d 338 (D.C. Cir. 2003) 4

National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981) 19

Pfizer, Inc. v. India, 434 U.S. 308 (1978) ..... *passim*

STATUTES

15 U.S.C. § 1 1

15 U.S.C. § 6a 2

15 U.S.C. § 15 1

15 U.S.C. § 25 1

LEGISLATIVE MATERIALS

H.R. Rep. No. 97-686 (1982) ..... *passim*

Hearings on H.R. 2326 *Before the Subcomm. on Monopolies and Commercial Law of the House Comm. On the Judiciary*, 97th Cong. (1981) 15, 17

Hearings on S. 795 *Before the Senate Comm. on the Judiciary*, 97th Cong. (1981) 13

INTERESTS OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy group with more than 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a range of consumer issues. Public Citizen has a longstanding interest in protecting American consumers from the detrimental effects of anti-competitive conduct, whether that conduct occurs domestically or abroad. For that reason, Public Citizen has testified before Congress regarding the Foreign Trade Antitrust Improvements Act and other antitrust legislation.

STATEMENT OF THE CASE

Respondents represent a class of foreign purchasers of vitamins that alleges that petitioners conspired to fix prices and allocate markets for vitamins on a global basis in violation of U.S. antitrust laws. Petitioners are foreign and domestic corporations that distribute and sell these products around the world. In July 2000, respondents filed this action under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 25, as well as the antitrust laws of other nations and

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

international law. Specifically, respondents allege that petitioners formed a cartel to engage in a worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins in almost every market, and that this conduct had an adverse effect in the United States and other nations that injured respondents by raising the prices for these vitamins.

In the district court, petitioners moved to dismiss, arguing that the court lacked subject matter jurisdiction under U.S. antitrust laws because respondents' claims arose from transactions and conduct that took place outside the United States. Respondents argued that under the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, the courts have subject matter jurisdiction over claims based on "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and "gives rise to a claim" under the Sherman Act. The district court dismissed the case for lack of jurisdiction, but the United States Court of Appeals for the D.C. Circuit reversed. This Court then granted the Petition for Writ of Certiorari to resolve a split in the circuits over the scope of subject matter jurisdiction over claims based on foreign conduct that also has an anti-competitive effect on the U.S. market.

SUMMARY OF ARGUMENT

This amicus brief focuses on the legislative history of the FTAIA, explaining how the testimony at hearings, the statements in committee reports, and various amendments to the bill's language all confirm that the statute's text means just what it says: Antitrust violators can be held liable for the full extent of the harm caused by anti-competitive conduct affecting U.S. markets. The legislative history reveals that Congress was focused on holding antitrust violators responsible for all of the injuries caused by their anti-competitive conduct, and not just the domestic effects of that conduct, to fully deter antitrust violators. Significantly, specific changes made to the bill's jurisdictional language demonstrate that Congress carefully considered and expressly chose to grant jurisdiction over claims, like respondents', that arise from the foreign, rather than domestic, effects of anti-competitive conduct. In sum, this Court should affirm the Court of Appeals' ruling because the FTAIA's text, purpose, and legislative history support the conclusion that the FTAIA provides subject matter jurisdiction over *all* claims arising from conduct having a negative effect on the domestic marketplace.

The Court of Appeals correctly held that the anti-competitive conduct alleged in this case is covered by the FTAIA because that conduct has "direct, substantial, and reasonably foreseeable effects" on U.S. commerce that "gives rise to a claim," which is all that the FTAIA requires. In other words, because the domestic effects of

petitioners' anti-competitive conduct violates U.S. antitrust laws, respondents can bring a claim against petitioners arising from the foreign effects of such conduct. Indeed, if antitrust jurisdiction did not extend to such claims, then firms engaged in conduct having negative effects on both foreign and domestic commerce would have little incentive to cease their anti-competitive behavior, secure in the knowledge that they could not be held liable for the full extent of their wrongdoing. This result cannot be squared with the language, structure, or legislative history of the FTAIA, which was intended to protect the domestic market against anti-competitive behavior and "'not to limit the liability of participants in transnational conspiracies that affect United States commerce.'" *Empagran v. F. Hoffman-LaRoche, Ltd*, 315 F.3d 338, 347 (D.C. Cir. 2003) (quoting *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 433 (5th Cir. 2001) (Higginbotham, J., dissenting)).

ANTITRUST VIOLATORS WHOSE ANTI-COMPETITIVE CONDUCT NEGATIVELY AFFECTS THE U.S. MARKET ARE LIABLE FOR ALL CLAIMS ARISING FROM THAT CONDUCT.

A. Congress's Purpose in Enacting the FTAIA is Consistent With an Intent to Provide Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

Congress intended the FTAIA to accomplish two goals. First, Congress sought to clarify the type of effects on U.S. commerce that would be necessary before an antitrust violator could be held liable in U.S. courts in cases involving U.S. exports. Second, Congress sought specifically to protect American exporters from antitrust suits. Both purposes are fully consistent with provisions of the FTAIA that give U.S. courts jurisdiction over all claims arising from anti-competitive conduct that affects U.S. commerce.

1. In enacting the FTAIA, Congress "clarif[ied]" the scope of "United States antitrust jurisdiction over international transactions" by stating that jurisdiction extends to "conduct having a 'direct, substantial and reasonably foreseeable effect' on domestic commerce or domestic exports." H.R. Rep. No. 97-686, at 2 (1982). Although petitioners and their amici assert that Congress's stated goal of clarifying jurisdiction is equivalent to narrowing that jurisdiction, *see, e.g.*, Pet. Br. 3; Amicus Business Roundtable Br. 6-7, 11, Congress said no such

thing. To the contrary, Congress sought to fully protect the domestic market against the detrimental effects of anti-competitive behavior — a result that could only be attained by providing jurisdiction over all claims arising from conduct that has a negative effect on U.S. commerce.

Petitioners and their amici concede that Congress sought to protect the U.S. market from anti-competitive behavior, *see* Pet. Br. 35, Amicus Business Roundtable Br. 16, Amicus Int'l Chamber of Commerce Br. 16, but fail to acknowledge that this objective cuts against petitioners' narrow reading of the FTAIA and in favor of respondents' more expansive view. To fully protect the domestic market, Congress had to establish subject matter jurisdiction over *all* claims arising from conduct negatively affecting domestic commerce. Were the FTAIA's jurisdiction limited as petitioners and their amici suggest, antitrust violators could continue to engage in anti-competitive conduct affecting U.S. and foreign markets, confident they would profit because their liability would be limited only to claims arising directly from harm to the U.S. markets. As stated in the House Report, "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. Rep. No. 97-686, at 10.

The House Report gave examples of the type of anti-competitive conduct that would harm both domestic

and foreign markets, and thus that would be deterred only by providing for jurisdiction over *all* claims arising from the effects of that conduct — whether those effects are felt abroad or at home. As the Report explained:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country — by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices — the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. Rep. 97-686, at 13. In short, Congress could only accomplish its goal of protecting the U.S. market by ensuring that antitrust violators would be held liable for *all* the harm arising from conduct having a negative effect on the U.S. market.

2. Congress's second aim in enacting the FTAIA — to limit the antitrust exposure of American exporters — by implication also supports the conclusion

that the FTAIA was intended to cover respondents' claims in this case.

In discussing the FTAIA's treatment of export-oriented activities, Congress contrasted the limited jurisdiction over export-oriented conduct with the expansive jurisdiction over all other types of anti-competitive conduct. H.R. Rep. 97-686, at 10. Accordingly, Congress explained that if export-oriented conduct injures a person "doing business in the United States," there is jurisdiction "insofar as there is injury to that person," but "a foreign firm whose non-domestic operations were injured by *the very same* export oriented conduct would have no remedy under our antitrust laws." *Id.* at 10-11 (emphasis added).

Petitioners suggest that the FTAIA's jurisdiction is *always* limited to claims based on the domestic effects of anti-competitive conduct. But Congress would not have needed to explain that jurisdiction over export-oriented conduct was limited to claims arising from domestic effects of that conduct, or to describe how that limitation was "different" from the FTAIA's grant of jurisdiction over all other types of conduct, *id.* at 10, had the two grants of jurisdiction been equivalent. *Cf. Pfizer, Inc. v. India*, 434 U.S. 308, 314 n.12 (1978) (holding that the specific prohibition against antitrust suits by foreigners injured by export-related conduct implies that jurisdiction exists when the conduct is not export-related).

B. The Legislative History Demonstrates That Congress Intended to Establish Liability for All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

Throughout the FTAIA's legislative history, Congress expressed its intent to hold firms liable for conduct having detrimental effects on the U.S. market. Congress's focus on anti-competitive *conduct*, as opposed to the negative domestic *effects* of that conduct, is further evidence that Congress intended to grant jurisdiction over all claims arising from such conduct.

For instance, the House Report repeatedly refers to the ability of foreign purchasers to allege a violation arising from conduct causing injury abroad as long as that conduct could also give rise to a domestic claim. In a section of the Committee Report entitled "Conduct Having a Foreign Impact," the Committee explained:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States — e.g., price fixing not limited to the export market — would affect all purchasers of the target products or services, whether the purchaser

> is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer, Inc., et al. v. Government of India, et al*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protections of our antitrust laws in the domestic marketplace, just as our citizens do.

H.R. Rep. No. 97-686, at 10 (emphasis in original). The Committee Report went on to explain that the reason for casting a wide jurisdictional net was to ensure that anti-competitive conduct causing harm to domestic markets was fully deterred:

> There are other reasons for preserving the rights of foreign persons to sue under our laws when the *conduct* in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer*, *supra*, 434 U.S. at 314-15, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amounts of damages payable only to injured domestic persons.

Id. (emphasis added). Again, Congress is expressing its intent to provide jurisdiction over all claims arising from conduct affecting the domestic market.

The House Report's citations to the *Pfizer* decision are further evidence that the Committee intended to grant jurisdiction over claims arising from the foreign as well as domestic effects of anti-competitive conduct. In *Pfizer*, the question before this Court was whether India, Iran, and the Philippines would be permitted to sue six pharmaceutical manufacturers on the ground that the six had conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of antibiotics in violation of the Sherman Act. In holding that these countries could bring suit under U.S. antitrust laws, this Court noted that jurisdiction over claims by foreigners for injuries suffered abroad serves to protect American markets:

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefitted by the maximum

> deterrent effect of treble damages upon all potential violators.

Pfizer, 434 U.S. at 315.

Petitioners dismiss the above-quoted sections of the House Report and this Court's opinion in *Pfizer*, claiming that they refer only to suits by non-Americans who purchase goods in the U.S. market. Pet. Br. 37. The discussion in the House Report was not so limited. In any case, *Pfizer*'s rationale, which the Committee cited and discussed favorably, supports granting jurisdiction over *any* claim arising from conduct that negatively affects the domestic market. As *Pfizer* teaches, an antitrust violator will be deterred from engaging in anti-competitive conduct affecting the U.S. market only if all claims arising from such conduct are remediable. That logic dictates providing for jurisdiction over all claims arising from conduct having an effect on the U.S. market, because a "worldwide price-fixing scheme could sustain monopoly prices in the Unitd States even in the face of such liability [based on U.S. sales] if it could cross-subsidize its American operations with profits from abroad." *Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting).

Significantly, much of the legislative history cited by petitioners and their amici is completely in accord with the conclusion that jurisdiction is based on conduct, not on domestic effects alone. For example, amicus International Chamber of Commerce quotes former Federal Trade Commissioner Robert Pitofsky's statement that

"transactions which exhaust their competitive consequences in foreign markets should be treated differently than those that have an internal domestic effect." Amicus Int'l Chamber of Commerce Br. 13 (quoting prepared statement of Robert Pitofsky, Esq. at Hearing on S. 795 before the Senate Comm. on the Judiciary, 97th Cong. (1981), at 45). All parties agree with Commissioner Pitofsky's view. The question here is whether a claim can be brought based on the foreign effects of transactions that do *not* exhaust their competitive consequences in foreign markets, but in fact have a negative effect on U.S. commerce. Respondents' view that the FTAIA provides for jurisdiction over such claims is perfectly consistent with Commissioner Pitofsky's statement. Indeed, Commissioner Pitofsky clearly stated that he thinks the bill should cover the conduct at issue in this case:

> I assume there is no debate that the antitrust laws *should* cover international cartel activity that affects U.S. markets — for example, a world-wide division of markets between U.S. and foreign companies that operates to exclude foreign companies from the U.S. markets — and to be absolutely certain on this point, the legislative history should probably say so.

Id. at 47 (emphasis in original).

C. Congress Amended the Bill to Clarify That Courts Have Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

The text of the jurisdictional provision in the FTAIA was altered before it took its final form, and those alterations confirm that Congress intended to establish subject matter jurisdiction over all claims arising from anti-competitive conduct affecting the U.S. market.

1. The original version of the House bill, H.R. 5235, provided that U.S. courts had subject matter jurisdiction over "unfair methods of competition" having a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce when "such effect is the basis of the violation alleged under this subsection." H.R. Rep. No. 97-686, at 2. Had that last clause remained in the final version of the statute, then U.S. courts would arguably not have jurisdiction over respondents' claims. However, that clause was changed to make clear that a lawsuit may be brought even when the effect on domestic commerce is *not* "the basis of the violation alleged." Thus, the final version of the FTAIA states that U.S. courts have jurisdiction over "conduct involving trade or commerce" with "foreign nations" if the "conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce "and such effect gives rise to a claim under the provisions of this Act." The change eliminates the required direct connection between the domestic effect of the conduct and the alleged violation; the domestic effect no longer needs

to be "the basis" for the claim. As long as the domestic effect of the conduct gives rise to "*a* claim," then *any* injury arising from the conduct is actionable.

Standing alone, the change in the legislative language speaks for itself: The domestic effect of the conduct need not be "the basis" for the litigation. But any doubt about the purpose of the change is dispelled by House Committee Chairman Rodino, one of the sponsors of the legislation, who explained that the alteration to the text was necessary because the original language might erroneously "suggest that a[] [domestic] effect, rather than conduct, is the basis for a violation." H.R. Rep. No. 97-686, at 18.

Petitioners and their amici mostly ignore the explicit alteration to the bill's language. They quote statements in the legislative history describing the narrow scope of the FTAIA's subject matter jurisdiction, but fail to acknowledge that these statements were made about earlier versions of the bill in which the jurisdictional language was indeed narrower.

For example, The Business Roundtable quotes Professor James Rahl's lament that the bill "'really repeals the whole "foreign commerce" clause of the Sherman Act,'" which the Rountable points to as evidence that Rahl was "aware that the FTAIA *restricted* U.S. antitrust jurisdiction." Amicus Business Roundtable Br. 13 (emphasis in original) (quoting Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. On the Judiciary, 97th Cong. (1981), at 46).

("House Hearings"). However, Rahl's criticism came *before* the bill's jurisdictional language was altered to address the very concern that he raised. H.R. Rep. 97-686, at 13. Thus, Rahl's testimony demonstrates that, prior to the change in the language, the legislation was unclear as to whether jurisdiction was limited to claims arising directly from domestic effects of anti-competitive conduct. The ambiguous language, which was criticized as potentially preventing U.S. courts from having subject matter jurisdiction over conduct adversely affecting the U.S. market, led to the change in language that was ultimately enacted into law.

Indeed, at the time of the 1981 Congressional hearings, The Business Roundtable was well aware that the jurisdictional language in the original version of H.R. 2326 was ambiguous. In its hearing testimony, The Business Roundtable expressed concern that the jurisdictional language was unclear and suggested that it be clarified to establish that there was *no* jurisdiction over claims that did not arise from domestic effects of anti-competitive conduct. In his testimony on behalf of The Business Roundtable, Martin Connor stated:

> [W]e urge the committee to clarify the intent of the legislation with respect to antitrust damage actions. As drafted, the bill probably precludes damages suits based on foreign effects of alleged antitrust violations. There is, however, some ambiguity on this score.

> For example, a foreign purchaser of U.S. exports could argue that the defendant's conduct had domestic as well as foreign effects and that the existence of some domestic effects creates a basis for a damage action based on the foreign effects as well.

House Hearings at 106. To clarify the bill's scope, Connor proposed the following amendment to the jurisdictional provisions:

> If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable only for any injury so occurring within the United States by reason of such restraints.

Id. at 111. The Business Roundtable's suggestion was not adopted by Congress.

Taking the opposite position from The Business Roundtable were experts who testified that the law should be amended to ensure that cartels could be held liable for all anti-competitive conduct that has a negative effect on U.S. commerce. For example, Professor Rahl testified that the language of the bill had "serious ambiguities." *Id.* at 46. In particular, he was concerned that it appeared to apply only to claims arising from "foreign trade causing an effect on interstate commerce." *Id.* In testimony quoted

in the House Report, H.R. Rep. 97-686, at 13, Rahl explained that the unclear jurisdictional language creates "the risk that this provision would encourage American firms not only to form cartels among themselves, but to participate in foreign and international cartels" causing "increased cartel activity and long-run damage to trade." *Id.* at 46. The House Report described Rahl's testimony as the "most important criticism" of the bill. H.R. Rep. 97-686, at 13.

It was in the context of this dispute over the ambiguous jurisdictional language that Chairman Rodino proposed changing the language to clarify that, if anti-competitive conduct has an effect on domestic commerce, a claim could be brought based on *any* injury arising from the anti-competitive conduct, whether arising in a domestic or foreign market.

2. Another change to the jurisdictional language further underscores Congress's intent to provide for jurisdiction over claims such as respondents'. During the legislative process, the bill that became the FTAIA was amended to make clear that the domestic "effect" that is the prerequisite for subject matter jurisdiction must itself be an antitrust violation. In fact, the purpose of the "gives rise to a claim" language is to ensure that courts would only have jurisdiction over conduct having *negative* effects on U.S. commerce. That clarification would have been wholly unnecessary if, as petitioners' contend, jurisdiction were limited to claims arising from the domestic effects of the conduct. Obviously, if plaintiffs could only bring

claims arising from domestic effects, then there was be no need to clarify that those "effects" must themselves be antitrust violations. Yet the House Committee Report devoted significant space to the discussion of this clarification:

> [T]he domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. *See, e.g., National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981). For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.
>
> * * *
>
> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace.

H.R. Rep. No. 97-686, at 11 (emphasis in original).

Put simply, the Committee could not have intended to limit jurisdiction to claims arising from domestic effects if it felt the need to clarify that the effect that is the "predicate" for jurisdiction must itself be "be of the type that the antitrust laws prohibit." *Id.* Indeed, this discussion would be nonsensical unless the FTAIA is read to provide for jurisdiction over all claims arising from conduct having domestic effects.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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No. 03-724

IN THE

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to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE LAW PROFESSORS RALF MICHAELS, HANNAH BUXBAUM and HORATIA MUIR WATT IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE DECISION BELOW DOES NOT ADDRESS INTERNATIONAL LAW RELEVANT TO-BOTH THE NARROW VIEW OF THE FTAIA ADVOCATED BY PETITIONERS AND THE BROAD VIEW ADVOCATED BY RESPONDENTS. ITS JURISDICTIONAL ANALYSIS IS THEREFORE INCOMPLETE. 3

A. Determining a court's jurisdiction to regulate worldwide cartels requires a two-step analysis. 3

B. This two-step analysis is consistent with existing U.S. caselaw and necessary for the effective regulation of global cartels. 4

C. Such a two-step test appears to be consistent with congressional intent as reflected in the legislative history of the FTAIA. 8

D. Neither the narrow interpretation of the FTAIA advocated by petitioners nor the broad interpretation endorsed by the court below fully incorporates both steps of the

jurisdictional analysis required by international law. 8

II. U.S. REGULATION OF THE ACTIVITY OF THE VITAMINS CARTEL, THROUGH PRIVATE ACTIONS BROUGHT BY PLAINTIFFS WHO SUFFERED INJURIES OUTSIDE THE UNITED STATES, RESTS ON A JURISDICTIONAL BASIS RECOGNIZED BY INTERNATIONAL LAW. 9

A. A State Has Jurisdiction to Regulate Conduct That Has Effects On Its Territory. 9

B. The Relevant Activity Is the Agreement to Fix Prices, Not the Individual Market Transactions. 11

C. Because Jurisdiction Based on Effects is Jurisdiction to Regulate Conduct, the Place of a Specific Injury is Not Relevant for the Effects Doctrine. 13

D. Regulation only with regard to injuries suffered in the United States can lead to underregulation, which is not required by international law. 14

III. EVEN WHEN THE EFFECTS OF A GLOBAL CARTEL ON U.S. MARKETS CREATE A JURISDICTIONAL BASIS FOR REGULATION, INTERNATIONAL LAW MAY RESTRAIN THE EXERCISE OF THAT JURISDICTION WITH REGARD TO INJURIES SUFFERED ABROAD. 17

A. Certain Factors may require the court to exercise jurisdictional restraint. 17

B. When no conflict with the regulatory policies of the market country exists, international law does not require the United States to restrain its jurisdiction with regard to injuries suffered in that country. Indeed, positive comity may favor the exercise of jurisdiction in such cases. 20

C. Jurisdiction in the United States should be restrained when another country's regulatory interests are stronger and would be impaired by the application of U.S. law. 23

1. Exercise of jurisdiction with respect to injuries suffered on foreign markets, especially against corporations from those markets, can lead to conflicts with foreign countries. 23

2. When such a conflict occurs, courts may exercise jurisdiction only if the U.S. interests are stronger than those of other countries. 25

CONCLUSION 27

TABLE OF AUTHORITIES

UNITED STATES CASES

Page

Bersch v. Drexel Firestone, Inc.,
519 F.2d 974 (2d Cir. 1975) 13

CSR Limited v. Federal Insurance Co.,
146 F. Supp. 2d 556 (D.N.J. 2001) 6

Capital Currency Exch., N.V. v. Nat'l Westminster Bank plc, 155 F.3d 603 (2d Cir. 1998) 5

In re Copper Antitrust Litig.,
117 F. Supp. 2d 875 (W.D. Wis. 2000) 19

Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.,
241 F.3d 420 (5th Cir. 2001) *cert. denied, sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) 11, 14, 20

Empagran S.A. v. F. Hoffman-LaRoche, Ltd.,
315 F.3d 338 (D.C. Cir. 2003) 8, 11, 12, 14

Hartford Fire Ins. Co. v. California,
509 U.S. 794 (1993) 5, 6, 7, 9, 20

Hilton v. Guyot,
159 U.S. 113 (1895) 5

Howe v. Goldcorp Investments Ltd.,
946 F.2d 944 (1st Cir. 1991) 5

Kruman v. Christie's,
284 F.3d 384 (2nd Cir. 2002) 11

Mannington Mills, Inc. v. Congoleum Corp.,
595 F.2d 1287 (3d Cir. 1979) 4

Metro Indus., Inc. v. Sammi Corp.,
82 F.3d 839 (9th Cir. 1996) 5

In re Microsoft Corp. Antitrust Litigation,
127 F. Supp. 2d 702 (D. Md. 2001), *cert. denied, sub nom. Dickson v. Microsoft Corp.*, 123 S. Ct. 2605 (2003) 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,473 U.S. 614 (1985) 4

Pfizer Inc. v. Gov't of India,
434 U.S. 308 (1978) 8, 14

Schwartz v. Visa International Corp.,
No. 822404-4, 2003 WL 1870370 (Cal. Super. Ct. Apr. 7, 2003) 26

Steele v. Bulova Watch Co.,
344 U.S. 280 (1952) 20

Timberlane Lumber Co. v. Bank of Am.,
549 F.2d 597 (9th Cir. 1976) 4, 8, 18, 19

Trugman-Nash, Inc. v. New Zealand Dairy Bd.,
954 F. Supp. 733 (S.D.N.Y. 1997) 5

United Phosphorus, Ltd. v. Angus Chem. Co.,
131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001), *cert. denied*, 124 S. Ct. 533 (2003) 19

United Phosphorus, Ltd. v. Angus Chem. Co.,
322 F.3d 942 (7th Cir. 2003) 7

FOREIGN CASES

Cases 89/85, 104/85, 114/85, 116-117/85 &125-129/85, *A. Ahlström OY v. E.C. Commission*, [1988] E.C.R. 5193 12

Commission Decision of 10 July 1986 relating to a proceeding under Article 85 (now 81) of the EEC Treaty (IV/31.371 - Roofing felt), 1986 O.J. L/232/15, ¶ 86, upheld on appeal: Case 246/86, *SC Belasco and others v. Commission* [1989] E.C.R. 2117 12

Commission Decision of 21 November 2001 (Case COMP/E-1/37.512 *Vitamins*), 2003 O.J. L 6/1 17

High Court of Justice, Queens Bench Division, 6 May 2003, *Provimi et al. v. Aventis S.A. et al.*, 2003 EWHC 961 (Comm), [2003] 2 All E.R. (Comm) 683 23

In re Westinghouse Elec. Corp., Uranium Contracts Litig., 1978 1 All E.R. 434 (H.L. 1977) 10

UNITED STATES AGREEMENTS

Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491, Art. 6 19

FOREIGN STATUTES & TREATIES

Article 6(1) of the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgments (2001 O.J. L 12/1) 23

Council Regulation (EC) No 2238/2003 of 15 December 2003, [2003] O.J. L-333/1, Art. 2 and 3 24

Council Regulation (EC) No 2271/96 of 22 November 1996, 1996 O.J. L-309/1 Art. 1 and 11 24

Treaty Establishing the European Community (Consolidated Version) 2002 O.J. C 325/33 11

§ 130 (2) Gesetz gegen Wettbewerbsbeschränkungen (GWB) v. 26.8.1998 (BGBl I S. 2546) [Statute against non-competitive behavior], *reprinted at* http://www.bundeskartellamt.de/GWB_E.pdf 10

United Kingdom Competition Act of 1998 10-11

MISCELLANEOUS

IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) 3, 7, 21, 26

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Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1 (1992) 5

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Restatement (Third) of Foreign Relations Law of the United States (1987) 5, 11, 14, 19

Ivo Schwartz & Jürgen Basedow, *Private International Law – Restrictions on Competition*, III-35 Int'l Enc. of Comp. L. (1995) 10

U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107, at §3.2 ..... 4, 19, 21, 22

Spencer Weber Waller, *Antitrust and American Business Abroad* (3d ed. 1997) 6

INTEREST OF THE AMICI CURIAE[1]

Amici Curiae are law professors from diverse national backgrounds who teach and write extensively in the fields of international jurisdiction and conflicts of law.[2] As international law specialists, they seek to promote an approach to the regulation of international economic activity in U.S. courts that is based on jurisdictional principles recognized by international law. Amici believe that neither the interpretation of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (the "FTAIA") that was endorsed by the court below, nor the contrary interpretation adopted in other courts, incorporates the full jurisdictional analysis mandated by international law. Their interest is in providing this Court with an intermediate view that accounts for international law limits on the exercise of jurisdiction

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[1] Amici Curiae file this brief with the written consents of all parties, which are submitted with this brief. This brief was authored by the amici listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No person or entity other than the Amici Curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Ralf Michaels has been a professor of law at the Duke University School of Law since 2002, and has held fellowships at the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg, Germany and at Harvard Law School. *See* www.law.duke.edu/fac/Michaels/profile.html. Hannah Buxbaum has been a professor of law at the Indiana University School of Law—Bloomington since 1997 and is the author, among other articles, of *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. of Int'l L. 219 (2001). *See* www.law.indiana.edu/directory/hbuxbaum.asp. Horatia Muir Watt has been a professor of law at the Sorbonne (University of Paris) since 1994 and is co-director of the Comparative Law Research Institute of Paris (UMR Paris I-CNRS) and Secretary General of the "Revue critique de droit international privé", the leading French law review on private international law. *See* http://panjuris.univ-paris1.fr/pages/cvmuir1.html.

without sacrificing U.S. regulatory interests when international law does not so require.

SUMMARY OF THE ARGUMENT

The questions of interpretation of the FTAIA that are presented concern the extraterritorial application of U.S. antitrust law. Neither the broad interpretation of the FTAIA that is endorsed by the court below, nor the narrow interpretation favored by petitioners, would take fair account of both the regulatory interests of the United States, on the one hand, and the need for jurisdictional restraint in response to the legitimate interests of foreign governments, on the other. Such an analysis requires two steps: establishing a jurisdictional basis for regulation, and then considering the exercise of jurisdictional restraint.

The holding of the court below that the United States has a jurisdictional basis to regulate a worldwide price-fixing agreement, even with regard to effects on markets outside the United States, is consistent with international law. Restricting that jurisdiction to effects felt in the United States might lead to underdeterrence and therefore impair the U.S. interest in protecting its markets. We therefore respectfully submit that the decision of the Court below should be affirmed to the extent that it recognizes the existence of that jurisdictional basis for regulation. However, relevant issues of jurisdictional restraint have not yet been raised by the parties and the court below has not (yet) engaged in the necessary second step. This second step, which we refer to below as a jurisdictional restraint analysis, would require attention (presumably by the Court below), with briefing directed to two kinds of factors. First, there are factors connecting the particular issue with a given country; these include the parties' nationality and the relative importance of effects of a worldwide cartel on a particular market. Second, the court below must consider whether the country in which the plaintiff suffered its injury effectively regulates cartels, and whether the exercise of U.S. jurisdiction over the plaintiff's

claim would cause a conflict with that country's regulatory efforts. If an analysis of these factors leads to the conclusion that no conflict exists, then the exercise of jurisdiction is legitimate under international law. On the other hand, if there is a conflict, jurisdiction is legitimate only if the U.S. interests are stronger than those of other countries.

ARGUMENT

I. THE DECISION BELOW DOES NOT ADDRESS INTERNATIONAL LAW RELEVANT TO BOTH THE NARROW VIEW OF THE FTAIA ADVOCATED BY PETITIONERS AND THE BROAD VIEW ADVOCATED BY RESPONDENTS. ITS JURISDICTIONAL ANALYSIS IS THEREFORE INCOMPLETE.

A. Determining a court's jurisdiction to regulate worldwide cartels requires a two-step analysis.

The issue of statutory interpretation before this Court concerns the extraterritorial application of U.S. antitrust law. The effects of the vitamin cartel's price-fixing activity were felt on both U.S. and foreign markets. When courts assert jurisdiction over such cartels based on the effects felt within their countries, several countries may have entirely legitimate overlapping claims to jurisdiction. U.S. regulation of the cartel activity, in a private damages action based on such effects, therefore requires analysis of international law limits on the reach of domestic regulations. Whether at the initial stage of determining jurisdiction or at the subsequent stage of considering whether a court should abstain from exercising jurisdiction, a court analyzing the extraterritorial application of U.S. law must engage in a two-step analysis. First, it must establish a jurisdictional basis for the application of U.S. law. Determining that such a basis exists simply recognizes that the United States has a legitimate interest in regulating the international activity in question. *See* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 270b, p. 336 (2d ed. 2000) ("[I]n an

interdependent world economy everything affects everything else. Yet no one would suggest that the Sherman Act should govern all international economic conduct. Accordingly, we must identify the ways of distinguishing those international matters affecting United States commerce sufficiently to warrant attention from our law."). Once that jurisdictional basis has been established, the courts must then go on to consider whether international law requires jurisdictional restraint. This step recognizes that "[w]henever foreign commerce or conduct is involved, a foreign government may also have an interest in the transaction . . . . Accordingly, attention must be given to whether and how to ascertain another state's interests and to defer to them . . . ." *Id.*

B. This two-step analysis is consistent with existing U.S. case law and necessary for the effective regulation of global cartels.

Both the agencies charged with enforcement of U.S. antitrust laws and courts charged with interpreting the reach of those laws view jurisdictional restraint as a principle that is critical to effective regulation of anticompetitive conduct. The International Antitrust Enforcement Guidelines ("IAEG") take note of the "broad concept of respect among co-equal sovereign nations," and outline the particular factors that the agencies weigh in their enforcement decisions when considering the competing interests of other nations. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107, at § 3.2. Cases in this Court and in the lower courts have held that the application of U.S. antitrust law must be restrained in response to such considerations.[3] Although in *Hartford Fire*

[3] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) ("foreign policy, reciprocity, comity, and

this Court indicated that the doctrine of comity was not relevant in situations involving no "true conflict," it did not eliminate entirely the analysis of factors counseling restraint.[4]

The concept of jurisdictional restraint in the application of U.S. law has found frequent expression in the doctrine of comity. *See Hilton v. Guyot*, 159 U.S. 113, 163-66 (1895). Similarly, although using different terminology, the Restatement (Third) of Foreign Relations Law of the United States uses the notion of a "reasonableness" test to capture these international law limits on legislative jurisdiction or its exercise. *See* Restatement § 403. *See also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 2 (1992) (casting it as an "international law presumption."). The need for jurisdictional restraint also underlies the application of *forum non conveniens* in cases – even those involving claims brought under U.S. regulatory laws – that involve significant foreign interests. As then-Chief Judge Breyer noted in dismissing a securities law claim, "The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Invs., Ltd.*,

limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction"); *see also* Restatement (Third) of Foreign Relations Law of the United States § 415 (1982) (the "Restatement") (applying a jurisdictional rule of reasonableness to antitrust regulation).

[4] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 794, 798 (1993); *see also Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736-37 (S.D.N.Y. 1997); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 846-47 (9th Cir. 1996) (applying a jurisdictional restraint analysis post-*Hartford Fire*).

946 F.2d 944, 950 (1st Cir. 1991).[5] Such an analysis of jurisdictional restraint is consistent with the judicial role, as this court has maintained in various procedural contexts. *See* Spencer Weber Waller, *Antitrust and American Business Abroad*, § 21: 21-31 (3d ed. 1997) (referring to "decisions like *Asahi, Aerospatiale*, and the *forum non conveniens* cases, all of which permit consideration of a broader range of factors in deciding whether U.S. courts should assert personal jurisdiction, use United States discovery rules, or dismiss cases in favor of foreign tribunals") (internal references omitted).[6]

The considerations of jurisdictional restraint are particularly important in cases involving global price-fixing, a form of anti-competitive activity very different from that presented in *Hartford Fire*. Indeed, in *Hartford Fire* itself, the conclusion that there was no true conflict between U.S. and U.K. antitrust laws, and that a further analysis of jurisdictional restraints was not required, may be ascribed to the fact that the conduct in question caused no effects on reinsurance markets within the United Kingdom, and therefore did not implicate a substantial regulatory interest of

[5] *See also Capital Currency Exch., N.V. v. Nat'l Westminster Bank plc*, 155 F.3d 603 (2d Cir. 1998) (dismissing an antitrust claim despite the unavailability of treble damages in the foreign court); *CSR Ltd. v. Fed. Ins. Co.*, 146 F. Supp. 2d 556 (D.N.J. 2001) (allowing *forum non conveniens* in antitrust litigation even if the foreign court does not provide for treble damages, but denying request in the case because of unavailability of plaintiff's witnesses in Australia).

[6] We take no position on whether this second step should be considered as a matter of jurisdiction or of abstention. We doubt, however, that a waiver by defendants with regard to possible jurisdictional restraint would preclude the court below from engaging in such an analysis. The jurisdictional restraint analysis in this case concerns the interests of foreign nations, and private parties cannot easily waive such public concerns.

that country with regard to effects.[7] Global cartels, by contrast, present a very different question in that they create effects both inside and outside the United States. *See* Areeda & Hovenkamp, *supra*, at pp. 380-81 ("the reinsurance contracts involved in [*Hartford Fire*] affect American risks *exclusively* and thus involve a stronger American interest than, say, a foreign cartel that ships the cartelized product everywhere, including the United States.") (emphasis in original). The problem is therefore not one of mediating between different substantive policies in the country where the effects were felt and that where the conduct occurred. Rather, the problem in this case is one of mediating between various countries in which the effects were felt, but where the substantive policies on the illegality of price-fixing are similar. The possible conflict is not one of substantive policy, in other words, but of potential interference with other countries' methods of enforcement. "[T]he number of disputes over so-called extraterritorial applications of national laws, whether by the United States, the European Union, or others, has dropped dramatically. Discussions today tend to focus on better ways of coordinating these many national-level regimes . . . ." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961 n.1 (7th Cir. 2003) (Wood, J., dissenting). While such conflicts are not necessarily less controversial (as the amicus curiae briefs filed by foreign governments in this case demonstrate), they require an analysis different from that used in *Hartford Fire*.

[7] Because in our view *Hartford Fire* dealt with a situation different from the one presented in this case, this brief does not take a position on whether its definition of "true conflict" is unduly narrow.

C. Such a two-step test appears to be consistent with congressional intent as reflected in the legislative history of the FTAIA.

Although the legislative history of the FTAIA may not be conclusive, it seems to support the view that Congress had such a two-step analysis in mind. On one hand it appears that Congress did not want to deny a jurisdictional basis entirely with regard to victims who suffered injuries abroad, as long as the conduct leading to their injuries also had substantial effects on the U.S. market. *See* H.R.Rep. No. 97-686, at 10 (1982) ("This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States") (citing *Pfizer Inc. v. Gov't of India*, 434 U.S. 308 (1978)); *see also Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 352-55 (D.C. Cir. 2003) (analyzing legislative history). On the other hand, it seems quite clear from the legislative history of the FTAIA that Congress, in establishing a basis of jurisdiction (step one), did not intend to foreclose considerations of jurisdictional restraint (step two). *See* H.R.Rep. No. 97-686, p. 13 ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (*citing Timberlane,* 549 F.2d at 613).

D. Neither the narrow interpretation of the FTAIA advocated by petitioners nor the broad interpretation endorsed by the court below fully incorporates both steps of the jurisdictional analysis required by international law.

The narrow view of jurisdiction that petitioners advocate is incorrect in suggesting that the United States has no jurisdictional basis to regulate the activities of the vitamins cartel under step one of the analysis above. Petitioners argue that "[s]ales of goods in foreign countries that do not

themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions." Br. For Petitioners ("Pet. Br."), at 24. As we submit below, this view needlessly prevents application of U.S. law in cases in which that application would further important regulatory interests of the United States, and would at the same time be entirely consistent with principles of international law. The broad view, on the other hand, although correctly recognizing the existence of a jurisdictional basis to regulate, is incomplete in that it ignores jurisdictional restraints entirely and could lead in particular cases to the application of U.S. law in violation of international law. We therefore submit that the finding of the court below regarding *jurisdictional basis* should be upheld, but that provision should be made for a subsequent consideration of *jurisdictional restraints* in further proceedings below.

II. U.S. REGULATION OF THE ACTIVITY OF THE VITAMINS CARTEL, THROUGH PRIVATE ACTIONS BROUGHT BY PLAINTIFFS WHO SUFFERED INJURIES OUTSIDE THE UNITED STATES, RESTS ON A JURISDICTIONAL BASIS RECOGNIZED BY INTERNATIONAL LAW.

A. A State Has Jurisdiction to Regulate Conduct That Has Effects On Its Territory.

This Court has long recognized the effects doctrine in the context of antitrust regulation. *See Hartford Fire,* 509 U.S. at 796 ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"). Although other countries have historically opposed this basis for jurisdiction, it is by now so widespread that it can almost be considered a principle of customary

international law. Several countries have enacted statutes explicitly providing for jurisdiction based on effects.[8]

The effects doctrine has even been accepted by countries that were formerly strictly opposed to it. The United Kingdom, for instance, had long resisted the effects doctrine. *See In re Westinghouse Elec. Corp., Uranium Contracts Litigation*, 1978 1 All E.R. 434 (H.L. 1977) (per Lord Hacking: "For many years now, the U.S. has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law."). A 1998 statute, however, now regulates agreements that "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom." *See* United Kingdom Competition Act of 1998, § 2 (1) and (3).

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[8] *See, e.g.*, for Germany, § 130 (2) Gesetz gegen Wettbewerbsbeschränkungen (GWB) v. 26.8.1998 (BGBl I S. 2546) [Statute against non-competitive behavior], *reprinted at* http://www.bundeskartellamt.de/GWB_E.pdf (english translation); for Japan, see Shogo Itoda, "Competition Policy of Japan and its Global Implementation," in Clifford Jones & Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System*, 61, 62 (2002) ("Any activities that have adverse effects on competition in the Japanese markets are subject to the Antimonopoly Act regardless of the nationality of companies"); for Canada, *see* Ronald T. Hughes & Michele J. Lawford, *Jurisdiction Issues in Prosecutions under Section 45 of the Competition Act*, in 2000 Papers of the Canadian Bar Association Annual Fall Conference on Competition Law 479, 489 (explaining legitimate interest of jurisdiction over conspiracies that target the Canadian market); *see also* Jürgen Basedow (ed.), *Limits and Control of Competition with a View to International Harmonization*, 27-29 (2002) (summing up recent developments with respect to the effects doctrine in various countries). For an overview of the adoption of the effects doctrine abroad, *see* Ivo Schwartz & Jürgen Basedow, *Private International Law – Restrictions on Competition*, III-35 Int'l Enc. of Comp. L., at 14ff. (1995).

Similarly, the European Union now appears to follow the effects doctrine. *See* Restatement § 415 reporter's note; *Gencor Ltd. v. Commission* (Case T-102/96, [1999] E.C.R. II-753, no. 90).

B. The Relevant Activity Is the Agreement to Fix Prices, Not the Individual Market Transactions.

What remains disputed is the proper content of the effects doctrine. As the court below correctly observed, the relevant activity for purposes of the effects doctrine is the conduct of the cartel in fixing prices, not the individual market transactions in which petitioners suffered resulting overcharges. *See Empagran*, 315 F.3d at 344. The other circuit courts that have addressed the interpretation of the FTAIA in this context agree on this point. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002); *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied, sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The United States therefore has a jurisdictional basis to regulate the price fixing conduct if it creates the requisite effect on U.S. markets, even if certain of the transactions implementing it take place outside the United States and do not, in isolation, have an effect on the U.S. market. This result is consistent with the policies behind antitrust law, which is directed at preventing anticompetitive agreements, not simply isolated instances of implementation. This view of the "effects test" is shared by other countries. *See, e.g.*, Art. 81 (a) (formerly 85) of the Treaty Establishing the European Community (Consolidated Version) O.J. C 325/33 (focusing on "agreements between undertakings . . . which directly or indirectly fix purchase or selling prices or any other trading conditions") (emphasis added). Although the European Court of Justice has held that implementation in the EU was necessary to trigger jurisdiction (Cases 89/85, 104/85, 114/85, 116-117/85 &125-129/85, A. Ahlström OY v. E.C. Commission ("WoodPulp"),

[1988] E.C.R. 5193), the jurisdiction so established is not restricted to implementing acts. The EU Commission has in fact (in a non-extraterritorial case) enforced this provision even against parties to an agreement who argued that there was no evidence of actual implementation at all. *See* Commission Decision of 10 July 1986 relating to a proceeding under Article 85 (now 81) of the EEC Treaty (IV/31.371 - Roofing felt), 1986 O.J. L/232/15, ¶ 86, upheld on appeal: Case 246/86, *SC Belasco and others v. Commission* [1989] E.C.R. 2117 ("[N]either the state of mind of the non-members when they entered into such agreements as to their intention of abiding by them, nor the fact that the non-members did not in fact observe the agreement (as some evidence suggests) would affect the Commission's finding that the agreements were made and that the non-members were parties to them.").

Indeed, in addressing the activities of a worldwide cartel, it would be inconsistent with the effects doctrine to base jurisdiction on the "transactions" with the purchasers as the relevant act; those transactions are merely the consequences of price-fixing. A focus on the individual implementing acts in different markets does not capture the global character of the cartel. If the vitamins cartel had been directed solely at the U.S. market, U.S. market participants would have been able to acquire vitamins from other markets at lower prices. A global cartel is effective only if it covers all, or at least all significant, markets. As a consequence, a country detrimentally affected by the cartel has an interest in regulating that cartel globally. *See also Empagran*, 315 F.3d at 341 (noting respondents' argument that the cartel used fixed U.S. prices "as a benchmark for the world's vitamin prices" in order to avoid arbitrage).

C. Because Jurisdiction Based on Effects is Jurisdiction to Regulate Conduct, the Place of a Specific Injury is Not Relevant for the Effects Doctrine.

Petitioners read the effects test to mean that jurisdiction over conduct is limited to the effects within the territory.[9] This is an incorrect reading of the effects doctrine. No principle exists in international law (aside from jurisdictional restraint arguments responding to the interests of other sovereigns) that limits jurisdiction, once it is established that there are effects on a particular country, to the effects in that country. Although effects are what triggers jurisdiction, it remains the anti-competitive conduct, not the effects, that is the subject of regulation.

In addition, there may be other legitimate grounds for jurisdiction. For example, when the conduct takes place within the United States, the United States has a jurisdictional basis to regulate that conduct, regardless of where the injuries occur. U.S. courts have recognized this approach in other areas of the law. *See, e.g.*, Ian Brownlie, *Principles of Public International Law*, 299 (5th ed. 2003) ("The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the

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[9] *See* Pet. Br., 24 ("Sales of goods in foreign countries that do not themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions."); *see also* Br. For the Gov't of Canada as Amicus Curiae Supporting Reversal ("Canada Br."), at 9 ("The transactions on which respondents base their claims under the Sherman Act occurred wholly outside of the territory of the United States . . . . Moreover, the transactions giving rise to respondents' claims had no effect on United States commerce. No effects on U.S. commerce or on U.S. foreign commerce . . . were alleged to have resulted from the transactions at issue here.").

sovereignty, the sum of legal competences, which a state has."). In the context of securities regulation, see *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) ("We have no doubt that the activities within the United States . . . were sufficient to authorize the United States to impose a rule with respect to consequences flowing from them *wherever they might appear.*") (emphasis added) (footnote omitted). *See also,* Restatement § 415(1).

D. Regulation only with regard to injuries suffered in the United States can lead to underregulation, which is not required by international law.

Petitioners' view that regulation in each country must be limited to injuries suffered in that country would lead to underregulation. "If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators." *Pfizer,* 434 U.S. at 315; *cf. Kruman,* 284 F.3d at 403; *Empagran,* 315 F.3d at 355-57; *Den Norske,* 241 F.3d at 435 (Higginbotham, J., dissenting).

Amici curiae for foreign governments submit that the danger of underdeterrence does not exist, because they themselves regulate price-fixing cartels heavily. *See, e.g.*, Br. of the Gov'ts of the Fed. Republic of Germany & Belgium as Amici Curiae in Support of Petitioners ("Germany & Belgium Br."), at 13-14. To the extent that effective regulation exists in a foreign market, the risk of underdeterrence, and thus the U.S. interest in regulation, are reduced *with regard to that market*. But amici curiae overlook the fact that there are other

markets, especially in developing countries, where such regulation is absent. *See, e.g.*, Germany & Belgium Br., at 17 ("The near-universal acceptance of an effects test . . . means that rarely, if ever, will a global conspiracy go unregulated and unpunished under other countries' competition laws . . . . This fact has been recognized on both sides of the Atlantic."). This failure to consider other countries is widespread: "[M]ost prior studies of the impact of these cartels have focused on the better-documented effects on wealthy, industrialized countries."[10] Yet the effects on those countries, and therefore the risk of underdeterrence, are substantial. A recent study shows that "cartels have adversely affected a not insignificant portion of the trade, and therefore the trade balance and consumption, of developing countries" (Levenstein, *supra* note 9, at 11), and finds that in 1997 alone "the total value of potentially 'cartel-affected' imports to developing countries was $51.1 billion" (*id.* at 9). It may be true that "more than 100 countries now have competition laws in one form or another" (William J. Kolasky, *The International Competition Network Guiding Principles for Merger Review* (Sept. 20, 2002), (*available at* http://www.usdoj.gov/atr/public/speeches/200234.htm). "But having a law is only the beginning. Implementing the law sensibly is what really matters." (*id.*). Indeed, "there has been relatively little activity on the part of developing country governments or developing country consumers to respond to these cartels even after they have been shown to exist," because those countries do "not have the legal, political, or bureaucratic resources necessary to prosecute international

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[10] Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy* at 3 (2004), (*available at* http://www-unix.oit.umass.edu/~maggiel/ALJ.pdf, forthcoming in Antitrust Law Journal).

cartels."[11] If the effects on these countries remain unconsidered, the danger of underdeterrence is very real.

Such underregulation is not generally mandated by international law. All bases of jurisdiction rest on the legitimacy of regulation by a sovereign state when that regulation is necessary to further its interests and there is a genuine link between those interests and the regulated activity. Such regulation must be confined, under a jurisdictional restraint analysis, if it would seriously impair the interests of other countries. However, when no interests of other countries would be impaired substantially by regulation, there is no rule of international law that requires states to regulate below the level necessary to further their own interests. Whether underregulation is not an actual danger because other countries enforce effectively, or whether U.S. interests must yield to the overwhelming interests of other states, necessarily depends on a case-by-case analysis. *See infra* Part III.

It should be noted that other countries, in the public enforcement of antitrust laws, take transactions on foreign markets into account when determining applicable penalties. The European Commission, in the vitamins cartel case, has, at least officially, endorsed a strict territoriality principle: "By virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 EEA is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the

[11] Levenstein & Suslow, *supra* note 9, at 3, 37; *see also* Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 Va. J. Int'l L. 911, 916 (2003) (noting that many developing countries "either do not have an antitrust law, or they have an antitrust law that is not given serious regard by their polity, or they simply do not have the resources to enforce the law.").

conduct has a direct and intended effect on US commerce." (Commission Decision of 21 November 2001 (Case COMP/E-1/37.512 *Vitamins*), 2003 O.J. L 6/1, no. 773). Although effects on the European market are necessary to trigger jurisdiction, the Commission takes extraterritorial transactions into account when calculating the level of fines to impose. It refers several times to the world-wide market (*see* no. 667) and the "effective economic capacity" of the cartel members (no. 678), which in itself depends on their worldwide business. "The Commission considers it appropriate [in determining fines] to appraise the relative importance of an undertaking in each of the vitamin product markets concerned on the basis of their respective worldwide turnover. This is supported by the fact that each cartel was global in nature, the object of each was, *inter alia*, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market." (no. 681). In other words, the European Commission likewise fears underdeterrence and combats it by taking worldwide turnover, including transactions outside the European Community, into account in determining the remedy necessary for deterrence.

III. EVEN WHEN THE EFFECTS OF A GLOBAL CARTEL ON U.S. MARKETS CREATE A JURISDICTIONAL BASIS FOR REGULATION, INTERNATIONAL LAW MAY RESTRAIN THE EXERCISE OF THAT JURISDICTION WITH REGARD TO INJURIES SUFFERED ABROAD.

A. Certain Factors may require the court to exercise jurisdictional restraint.

The establishment of a jurisdictional basis to regulate is only the first step. At the second stage of the analysis, a court must examine both the jurisdictional nexus of the case with each of the relevant countries and the particular conflict of regulatory policy presented. In the case of global hard-core price-fixing cartels, when all countries agree on their

substantive illegality,[12] relevant connecting factors would include, in addition to the place of the market where plaintiff's injuries were suffered:

(1) *the nationality of the plaintiff.* This factor is relevant in that countries have a legitimate interest in providing their own nationals with adequate remedies for injuries they suffer. *See Brownlie, supra*, at 301-2, with references; Restatement § 403(2)(b).

(2) *the nationality and principal place of business of the defendant.* The defendant's nationality and principal place of business create national interests because a country may have a legitimate interest in protecting its own nationals from what it considers excessive claims for damages, or a legitimate interest in regulating its own corporations even with respect to conduct engaged in and effects caused abroad. *See Timberlane,* 549 F.2d at 614 n. 33 (and accompanying text); Restatement § 403(2)(b); Br. of the Gov't of Japan as Amicus Curiae in Support of Petitioners ("Japan Br."), at 9 ("This could, at the least, put Japanese firms at a serious competitive disadvantage"); Germany & Belgium Br., at 2 ("Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs . . . .").

(3) *the place of the price-fixing conduct.* "Congress did contemplate that the effects test would encompass not only conduct committed outside of the United States having effects within the United States, but also conduct committed within the United States having effects both within and

[12] This brief is confined to situations like outright price-fixing, where no conflict as to the legality of the conduct in question exists. This brief also does not address the analysis appropriate in non-antitrust contexts such as securities law cases.

outside the United States" (*In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 715 (D. Md. 2001), *cert. denied, sub nom. Dickson v. Microsoft Corp.*, 123 S. Ct. 2605 (2003); *see also United Phosphorus*, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001), *cert. denied*, 124 S. Ct. 533 (2003), *but cf. In re Copper Antitrust Litig.*, 117 F. Supp.2d 875, 887 (W.D. Wis. 2000) (denying jurisdiction despite conduct in the United States for "mostly foreign plaintiffs."); Restatement § 415(1).

(4) *the proportion of the cartel's global effects felt in the United States as compared to other countries. See Timberlane,* 549 F. 2d at 615; Restatement § 403(3). The interests of the United States in worldwide regulation are stronger (and those of other countries in avoiding such regulation weaker), the more the global effects are felt in U.S. markets relative to other markets.

* * *

It is important to note that merely because these connecting factors link the activity to multiple countries does not necessarily create a regulatory conflict. Rather, two additional factors are relevant, speaking not to jurisdictional nexus but to enforcement:

(5) *effective regulation in the market country sufficient to achieve deterrence of cartel activity.* Effective regulation in the market country is relevant because it may be sufficient to achieve deterrence of cartel activity with regard to injuries suffered in that country, thereby reducing the U.S. interest in regulating. (*See* IAEG, *supra*, at § 3.2 nos. (7) and (8); Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491, Art. 6; Restatement § 403(2)(c)). Even if regulation by the countries whose governments submitted amicus briefs in this case is effective with regard to their markets, merely nominal

regulation that might occur in other foreign markets would not similarly reduce the U.S. interest with regard to those markets.

(6) *the existence of conflicting regulatory antitrust enforcement mechanisms in the market country*. Conflicting antitrust mechanisms can (but do not automatically) create conflicts, because one country's enforcement mechanisms may undermine or be inconsistent with those of another country. In particular, to assume jurisdiction over the claims of foreign plaintiffs may undermine foreign leniency programs. *See infra*.

B. When no conflict with the regulatory policies of the market country exists, international law does not require the United States to restrain its jurisdiction with regard to injuries suffered in that country. Indeed, positive comity may favor the exercise of jurisdiction in such cases.

The interpretation advocated by Petitioners, and adopted by the Fifth Circuit in *Den Norske*, results in a rigid rule that a private U.S. antitrust action is unavailable if the particular market transaction that injured the plaintiff occurred in another country. This rule overshoots the mark. Although Petitioners recognize that the fundamental concern underpinning regulatory restraint is that application of U.S. law may "infring[e] the prerogatives of foreign sovereigns," (Pet. Br. at 9), the rule they propose would eliminate jurisdiction in cases in which no such infringement would occur. When no conflict exists, a jurisdictional restraint analysis is unnecessary. This is in accordance with *Hartford Fire*, in which the majority and dissenting opinions agreed that a conflict required a comity analysis (although they disagreed on whether the case in fact presented a conflict). *See also, Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (in a trademark case, where the other nation involved had withdrawn a conflicting foreign registration, stating that

"[w]here, as here, there can be no interference with the sovereignty of another nation," extraterritorial application of U.S. law was appropriate).

This case involves outright price-fixing – a form of anti-competitive behavior on which the substantive policies of all countries are agreed. *See* Germany & Belgium Br., at 12 ("[H]ard-core cartels . . . are prohibited almost universally"); Canada Br., at 1-2 ("[N]aked price-fixing cartels are subject to the same criminal denunciation in Canada as in the United States"); Br. of the United Kingdom of Great Britain & N. Ireland, Ireland & the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners ("United Kingdom Br."), at 2 ("The competition laws of the United Kingdom, Ireland, the Netherlands, and the European Community . . . outlaw most horizontal cartels"). Despite the worldwide agreement on substantive anti-cartel policy, however, several of the amici curiae correctly point out that conflict may nevertheless arise from differences in methods of regulation. *See, e.g.*, Germany & Belgium Br., 28-30; *see also* Areeda & Hovenkamp, *supra*, at 413 ("[E]ven where two jurisdictions would protect competition from private restraints or monopolies, they may differ greatly in their substantive provisions, procedures, and remedies."). Some countries do not recognize private actions at all. Countries that do permit private actions may have substantially different policies regarding the availability of non-compensatory damages, one-way fee shifting, and class action certification. *See* Joseph P. Griffin, *Jurisdictional and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 516 (1998) ("These basic differences among systems are compounded by numerous aspects of American antitrust practice that are not often found outside the United States"); Buxbaum, *supra* note 1, at 251 (noting widespread foreign objection to treble damages remedies). The agencies charged with public enforcement have explicitly recognized the conflict over

private actions, not just over anti-competition policy, as relevant to the jurisdictional analysis (IAEG, *supra*, at § 3.2).

However, differences in regulation methods alone do not automatically raise a conflict. Rather, the question is whether in the particular case the regulatory interest of the foreign sovereign is impaired. This is not the case, for instance, when the country on whose territory the plaintiff suffered its injuries has a policy against price-fixing, but does not enforce against cartel behavior at all. This is true for some developing countries; *see supra*. It may also be true with regard to developed countries, which might condemn a particular cartel but leave its regulation to the United States (a situation that may not be presented in the case before this Court with regard to the countries that submitted amicus briefs). If the country in which the market transaction took place has a policy against cartels but no interest in regulating the cartel activity, or does not apply its own laws to extraterritorial conduct, then permitting an action in the United States will not cause regulatory conflict with that sovereign. Moreover, the U.S. interest in preventing underdeterrence is at its strongest in such a case, in that the other country is not itself engaged in enforcement activity that would lead to deterrence of cartel behavior.

In such situations, recognized principles of positive comity may even counsel in favor of the exercise of U.S. jurisdiction. Multiplication and balkanization of antitrust enforcement raise enforcement costs, and may make enforcement in small markets prohibitively costly. For similar reasons, governmental antitrust authorities have developed, on the basis of positive comity, measures to collaborate in the enforcement of antitrust policies. When one country's authorities are in a better position to regulate, another nation's authorities may stay their proceedings pending enforcement. *See* IAEG, *supra*, at § 3.2, Illustrative Example 1. Similar coordination is possible, and may be desirable, with regard to private litigation by plaintiffs from

countries that are not opposed to the assumption of jurisdiction in U.S. courts.

In pursuing such an interest in bundling litigation, the United States is not alone. This concern also informs Article 6(1) of the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgments (2001 O.J. L 12/1), for instance, under which "[a] person domiciled in a Member State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Under this provision, the English High Court recently allowed an action brought in England by a German purchaser of vitamins from a German seller in Germany, as long as there was one jurisdictional nexus to England (here: one of the defendants was an English corporation). *See* High Court of Justice, Queens Bench Division, 6 May 2003, *Provimi et al. v. Aventis S.A. et al.*, 2003 EWHC 961 (Comm), [2003] 2 All E.R. (Comm) 683. Thus, even though jurisdiction of U.S. courts here could "make[] United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants" (United Kingdom Br., at 13), the English decision "may pave the way for the English courts to become the courts of choice by plaintiffs located in other European countries." Bruce A. Baird et al., *Corporate Leniency Applications*, 2004 Global Competition Review, (*available at* http://www.globalcompetitionreview.com/ara/international.cfm.)

C. Jurisdiction in the United States should be restrained when another country's regulatory interests are stronger and would be impaired by the application of U.S. law.

1. Exercise of jurisdiction with respect to injuries suffered on foreign markets, especially against corporations from those markets, can lead to conflicts with foreign countries.

A conflict can arise when the availability of a private action in the United States conflicts directly with foreign regulatory activity. For instance, countries may utilize particular regulatory programs, including leniency programs, whose operation would be undermined by the availability of private actions in the United States. *See* Canada Br., at 13 (noting that "upholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program"); Germany & Belgium Br., United Kingdom Br.; Japan Br. This particular conflict has in fact been recognized as problematic by the U.S. enforcement agencies as well. *See* Br. for the United States as Amicus Curiae Supporting Petitioners. Similarly, awarding treble damages in actions against foreign corporations for injuries suffered in markets outside the United States that have effective regulatory systems can lead to conflict with these corporations' home countries. The blocking or clawback statutes adopted by many countries are usually aimed at protecting their own nationals from the imposition of treble damages awards.[13]

[13] *See* Japan Br., at 8-9; Germany & Belgium Br., at 2 (identifying Germany's interest in avoiding "treble damages in private lawsuits against German companies"). *See also* Council Regulation (EC) No 2271/96 of 22 November 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 1996 O.J. L-309/1 Art. 1 and 11; Council Regulation (EC) No 2238/2003 of 15 December 2003 protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom, [2003] O.J. L-333/1, Art. 2 and 3. Likewise, the First Secretary (Trade Policy) of the British Embassy, Washington, D.C. has remarked that "The primary purpose of the [British Protection of Trade Interests Act 1980, which provides a clawback provision] is to provide protection to *British* businesses threatened with the application of the laws of a foreign country to conduct occurring outside that country. Nicholas Davidson, *U.S. Secondary Sanctions: The U.K. and EU Response*, 27 Stetson L. Rev. 1425, 1427 (1998) (emphasis added). *See* Canada Br., at 14 ("United States jurisdiction under the facts of this case would also conflict with Canadian antitrust regulation by undermining Canada's national policy of allowing civil recourse only up to the amount of actual damages plus costs"); Japan Br., at 9 ("This could, at the least, put Japanese firms at a serious competitive disadvantage.").

2. When such a conflict occurs, courts may exercise jurisdiction only if the U.S. interests are stronger than those of other countries.

When such a conflict occurs, it must be resolved through an analysis of the countries' respective interests. If the exercise of jurisdiction would severely impair the interests of a foreign nation, but only marginally further U.S. interests, jurisdiction should not be exercised. This may be the case, for example, when the defendant is a foreign national, and the injury occurred in a foreign market that has effective regulation. *See* Canada Br., at 14 (noting that "[t]he conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behavior by Canadian companies in Canada that injured Canadian nationals."). In such a case, exercising jurisdiction might risk impairment of Canada's interests in regulation. In addition, U.S. interests with regard to injuries suffered in countries in which effective regulation and

deterrence occur might be minimal, because such regulation greatly reduces the risk of underdeterrence.

If, on the other hand, the relevant connecting factors in a particular case point strongly toward the United States, the exercise of jurisdiction might be reasonable even when the country on whose market the injury occurred does have an interest in regulating the conduct. For instance, if the defendant is a U.S. corporation and the effects felt in the United States are significantly larger than those felt elsewhere, then the concepts of jurisdictional restraint may not counsel deference to foreign law solely because the transaction causing plaintiff's injury arose in a foreign market. *See* Areeda & Hovenkamp, *supra*, at 411 ("Often the conflict with other nations can be minimized by emphasizing relief against the American defendants rather than the foreign nationals."). In such a situation, the interest of the country in whose market the injury occurred is hardly impaired even if that country has a policy against treble damages, because the primary concern underlying such a policy is the protection of local corporations from treble damages. In addition, that country's leniency program may be less seriously impaired, because the minor benefit the defendant could hope for from the leniency program of such a country would likely be relatively unattractive when weighed against the more substantial risks faced in the United States. And, importantly, in cases such as this one that involve both U.S. and foreign defendants, the exercise of jurisdiction may be justified as against a U.S. defendant even if the jurisdictional restraint analysis were to prevent the exercise of jurisdiction as against a foreign defendant.[14]

[14] Jurisdiction of differing geographic scopes as to different defendants was recently exercised, for example, in *Schwartz v. Visa International Corp.*, No. 822404-4, 2003 WL 1870370, at *61, *74 (Cal. Super. Ct. Apr. 7, 2003), in which a nationwide class was established under California state law as to a California-based defendant, but only a California class

CONCLUSION

The decision below should be affirmed to the extent that it holds that there is a jurisdictional basis permitting private actions in the United States to recover damages for injuries suffered abroad.

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was created as to a New York-based defendant, based on somewhat different considerations concerning the appropriate reach of California state law.

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Petitioners,

v.

EMPAGRAN, S.A., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CERTAIN PROFESSORS OF ECONOMICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. WHERE INTERNATIONAL MARKETS INCLUDE THE UNITED STATES, THERE HAS TYPICALLY BEEN INSUFFICIENT DETERRENCE AGAINST PRICE-FIXING CONSPIRACIES HARMING U.S. COMMERCE	5
A. When Firms Act Collusively To Set Prices In International Markets That Include The United States, The Harm To Foreign Customers Is Inextricably Intertwined With The Harm To U.S. Customers	5
B. An International Cartel That Is Caught And Prosecuted In The United States Still Stands To Make Substantial Gains From Its Price-Fixing Activity In The Absence Of Sherman Act Claims By Foreign Victims	7
II. ECONOMIC LOGIC IMPLIES THAT, IN ORDER TO EFFECTIVELY DETER GLOBAL PRICE-FIXING CONSPIRACIES, CLAIMS BY FOREIGN CUSTOMERS SHOULD BE ALLOWED IN U.S. COURTS IN CASES INVOLVING SUCH CONSPIRACIES	12

TABLE OF CONTENTS—Continued

Page

A. Effective Deterrence Requires An Alignment Of The Geographic Scope Of The Cartelized Market With The Geographic Scope Of Enforcement..... 12

B. Correctly Aligning The Geographic Scope Of Enforcement With The Geographic Scope Of The Cartelized Market Will Not Undermine The Deterrent Effect Of The Amnesty Program. 13

C. Allowing Foreign Claims In U.S. Courts Will Not Result In Over-Deterrence..... 18

D. Increasing The Legal Penalties For Cartel Formation Will Not Reinforce Cartel Behavior..... 21

E. Aligning The Geographic Scope Of Enforcement With The Geographic Scope Of Cartelized Markets Will Not Flood U.S. Courts With Claims By Foreign Plaintiffs. . 22

CONCLUSION 23

APPENDIX A (Vitamins Fines Imposed By U.S. And Foreign Antitrust Authorities) 1a

TABLE OF AUTHORITIES

Page

Dilip Abreu, David Pearce, & Ennio Stacchetti, *Optimal Cartel Equilibria with Imperfect Monitoring*, 39 J. Econ. Theory 251 (1986)..... 22

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Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331 (1989)..... 19

TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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IN THE

Supreme Court of the United States

No. 03-724

F. HOFFMANN-LA ROCHE LTD, *et al.*
Petitioners,

v.

EMPAGRAN, S.A., *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CERTAIN PROFESSORS OF ECONOMICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who teach and write on economic issues and are concerned about the effectiveness of our antitrust laws in protecting American consumers and businesses. They are B. Douglas Bernheim, Lewis and

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than these *amici* or their counsel, has made any monetary contribution to the preparation or submission of this brief.

Virginia Eaton Professor of Economics, Stanford University; Vincent P. Crawford, Professor of Economics, University of California, San Diego; Robert E. Hall, Robert and Carole McNeil Professor of Economics and Senior Fellow, Hoover Institution, Stanford University; Robert C. Marshall, Head, Department of Economics & Professor of Economics, The Pennsylvania State University; Paul Milgrom, Shirley R. and Leonard W. Ely Jr. Prof. of Humanities and Sciences, Stanford University; Jeffrey M. Perloff, Professor of Agricultural and Resource Economics, University of California, Berkeley; and Halbert L. White, Jr., Professor of Economics, University of California, San Diego.

Various of the *amici* have taught, researched and published analyses of the economics of cartels and the effect of government policy on the incentive to engage in price-fixing behavior. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. None of the *amici* represents or is employed by any party in this action.[2]

SUMMARY OF ARGUMENT

This brief provides an analysis of policy issues pertinent to the question of whether foreign purchasers should be permitted to sue under U.S. antitrust law for overcharges by cartels encompassing international markets that include the United States. We argue that in such circumstances economic logic counsels allowance of the claims of all victims in order to preserve the deterrent effect of U.S. antitrust law for the benefit of U.S. consumers and businesses.

It is generally recognized that the primary focus of U.S. antitrust law is to provide a deterrent to behaviors that harm

[2] Four of the *amici* (Professors Bernheim, Marshall, Perloff and White) were retained by domestic purchasers of vitamins to provide economic services in separate actions against Petitioners.

U.S. commerce. We will argue that legal remedies based on domestic transactions alone are typically insufficient to deter price-fixing behavior in the case of cartels that operate in international markets that include the United States. This logic applies typically to all conspiracies in which the relevant geographic market is broad enough to encompass the United States and the locations of the pertinent foreign transactions.

In international markets where products move relatively freely, a successful price-fixing cartel will need to take into account product flows between regions. In this context, a relevant geographic market constitutes the set of regions in which the flow of product is sufficiently responsive to regional differences in price to significantly limit price differences. If a price-fixing cartel tried to raise prices in only one portion of its relevant market, market forces would reallocate commodities from the unaffected portion to the affected portion and thus restrain the effectiveness of any regional price increases.

Applied to a situation in which the relevant geographic market includes the United States and other regions of the world, this logic implies that any attempt by a cartel to raise prices outside the United States, without affecting U.S. prices, or vice versa, will be restrained by profitable reallocation opportunities (arbitrage). Therefore, in such markets price-fixing cartels have an incentive to target prices both inside and outside the United States to maximize their potential gains. Indeed, in the case of multinational buyers who source an input product in several regions, a cartel may be forced to fix prices in all regions in order to be credible to its buyers. The injuries sustained by foreign victims therefore bear a very real connection to the conspiracy's effects on U.S. commerce, and vice versa. This logic, therefore, raises the important question of what remedies are necessary to deter harm to U.S. commerce.

The examples of the vitamins, lysine, citric acid, graphite electrodes, and other international price-fixing cartels illustrate that there is frequently inadequate deterrence to protect U.S. commerce from global price-fixing cartels unless all victims can pursue their remedies under U.S. law. In the case of the vitamins cartel, for example, the conspiring firms' worldwide profits have substantially exceeded the total value of government fines and the civil recoveries obtained thus far. More generally, given that antitrust enforcement outside the United States is less aggressive, and hence penalties significantly lower than in the United States, the prospect of treble damages for domestic transactions alone will likely be insufficient to deter the formation of a large international cartel, as non-U.S. profits will likely outweigh even the maximum possible sanctions available within the United States and abroad.

The focus on *ex ante* deterrence is particularly important in view of the fact that, according to some estimates, more than two-thirds of conspiratorial activity goes undetected and unpunished. That deterrence is weak in practice is illustrated by the observed recidivism of cartel members, many of which are serial offenders. As long as the gap between the expected costs and benefits of forming a cartel is large, which we show is often the case when cartels are international in scope, firms will have an incentive to engage in price-fixing behavior that harms U.S. consumers and businesses.

In summary, we believe that in order to maintain the deterrent effect of U.S. antitrust law for the benefit of U.S. commerce, the U.S. antitrust laws should allow price-fixing claims arising from foreign transactions that are within the same relevant market as affected U.S. transactions.

ARGUMENT

I. WHERE INTERNATIONAL MARKETS INCLUDE THE UNITED STATES, THERE HAS TYPICALLY BEEN INSUFFICIENT DETERRENCE AGAINST PRICE-FIXING CONSPIRACIES HARMING U.S. COMMERCE.

A. When Firms Act Collusively To Set Prices In International Markets That Include The United States, The Harm To Foreign Customers Is Inextricably Intertwined With The Harm To U.S. Customers.

A relevant geographic market constitutes the set of regions in which the flow of product is sufficiently responsive to regional differences in price to significantly limit price differences. By way of illustration, if the price in region *A* for a particular product were sufficiently high, buyers in that region would have an incentive to purchase the product from another region, say region *B*, and transport it to their location. They would do this if the cost savings from buying in region *B* were sufficient to offset the costs incurred in transporting the product to region *A* (plus any additional costs they may have to pay, such as tariffs or other administrative fees). Alternatively (and equivalently), there would be an opportunity for an intermediary to purchase the product in the lower-priced region and resell it in the higher-priced region.

It is well understood by economists that the mobility of products has important consequences for the efficacy of price-setting actions. If a price-fixing cartel sets out to raise prices substantially in only one portion of a relevant market, market forces would reallocate commodities from the unaffected portion to the affected portion and thus undercut the effectiveness of any attempted price increases. In other words, a higher price in region A could not be sustained unless prices in region *B* were high enough to make it

unprofitable for buyers in region *A* (or for other intermediaries) to engage in arbitrage.

When products can move freely between regions and countries, any attempt by a cartel to raise prices outside the United States, without affecting U.S. prices, will be restrained by profitable reallocation opportunities. In such markets, price-fixing cartels have a strong incentive to target prices both inside and outside the United States to maximize their potential gains. Moreover, in many markets, products are purchased by multinational firms through competitive procurement processes. A conspiracy that covers some regions of such a market but not others would presumably face a challenge in making a case to a multinational buyer for charging widely varying prices in different regions. Thus, cartels in international markets must be international in scope to be effective and credible when dealing with multinational customers. Therefore, price-fixing activity in non-U.S. regions that are closely tied to U.S. commerce will result in higher prices to U.S. customers.

A look at the activity of several recent international cartels reveals the extent to which firms coordinate price setting in multiple regions. The U.S. Department of Justice has given the following description:

> [A] common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. . . Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the

> penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.[3]

Clearly, the effects on U.S. commerce of price-fixing activity in an international market that includes the United States will be connected to the effects on international commerce. Equally important, any attempt to analyze the incentives for cartel formation that does not take into account the portions of the relevant market outside the United States will substantially understate the true gains from forming a cartel that includes the United States and other regions.

B. An International Cartel That Is Caught And Prosecuted In The United States Still Stands To Make Substantial Gains From Its Price-Fixing Activity In The Absence Of Sherman Act Claims By Foreign Victims.

U.S. policy seeks to deter cartel formation by ensuring that the likelihood of detection is sufficiently high, and the consequences sufficiently severe, to outweigh the supra-normal profits potentially earned from price fixing. It does this through a *combination* of criminal penalties (fines and

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[3] James M. Griffin, *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels*, Speech by Deputy Assistant Attorney General, Antitrust Division Before the American Bar Association Section of Antitrust Law 48th Annual Spring Meeting (Apr. 6, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/4489.htm. Also, in a 2002 report titled *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, DAFFE/COMP(2002)7, at 8 (Apr. 9, 2002) ("OECD Report (2002)"), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf, the Organization for Economic Co-operation and Development ("OECD") notes that several of the international conspiracies had devised complex price-fixing schemes, which were augmented by market allocation agreements, either in the form of quotas or territorial agreements.

jail terms) and civil liability. Civil recoveries based on treble damages are often considerably larger than criminal fines, and consequently play a key role in establishing an adequate level of deterrence.

The potential gains from price fixing rise with the size of the cartelized market. Accordingly, to maintain adequate deterrence for large international cartels, it is important to ensure that the consequences of detection are proportionately more severe. With respect to civil remedies, this condition is not satisfied unless foreign purchasers have an ability to seek and collect treble damages comparable to that of domestic purchasers.

Foreign victims of international cartels have, in practice, limited ability to seek and collect damages in their home countries. The laws of several OECD countries provide for the recovery of compensatory damages, but not treble damages, and courts rarely impose any such civil remedies outside the United States.[4] Likewise, most developing countries do not provide for trebling or other enhancement of the actual damages incurred by the victim.[5] Consequently, unless foreign victims of international conspiracies can seek and collect damages in U.S. courts, the deterrent effect of civil liability is considerably attenuated, relative to domestic conspiracies.

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[4] See OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) ("OECD Report (2003)") at 29, *available at* http://www1.oecd.org/publications/e-book/2403011E.PDF.

[5] *See generally* Margaret C. Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy* (Mar. 1, 2004) ("Levenstein, et al (2004)"), *available at* http://www-unix.oit.umass.edu/~maggiel/ALJ.pdf. "There are in many countries significant legal and procedural hurdles to such suits. Whatever the *de jure* potential of private implementation of competition policy, in practice such private suits are extremely rare." *Id.* at 37-38.

Moreover, criminal penalties outside the United States tend in practice to be significantly smaller as a fraction of the affected commerce.[6] One recent study suggests that, while very large fines were imposed in a few countries, in the majority of countries significant fines had not been imposed in cartel cases.[7] In addition, sanctions against individuals (in the form of fines or prison sentences) have also been applied in very few countries.[8] This is even more so in the case of developing countries, where the legal infrastructure and political and human resources for effective competition policy enforcement often do not exist.[9] While some foreign governments are becoming more aggressive in criminally prosecuting cartels, it is unrealistic to expect that the rest of the world will pursue criminal sanctions significantly *more* severe than those imposed in the United States. Efforts to harmonize international antitrust enforcement would at most bring foreign criminal sanctions *in line* with U.S. criminal sanctions. While this would replicate, for international cartels, the portion of deterrence stemming from U.S. criminal policy, it would not in any way compensate for the virtual absence of a foreign civil deterrent.

The example of the vitamins conspiracy provides a concrete illustration. Based upon publicly available information, defendants' worldwide vitamin sales during the period of admitted conspiracy totaled approximately $30 billion.[10]

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[6] OECD Report (2003), Annex A.

[7] *Id.* at. 28.

[8] *Id.* at. 29. The report notes further that, in the period covered by the report, only Australia, Canada, Germany and the U.S. had imposed fines, and only the U.S. and Canada had imposed jail sentences.

[9] *See*, Levenstein et al. (2004) at 37-38.

[10] *See*, John M. Connor, *The Food and Agricultural Global Cartels of the 1990s: Overview and Update* (July 2002) (Staff Paper # 02-4, Department of Agricultural Economics, Purdue University)

Estimated overcharges across all vitamins averaged approximately 20-27 percent.[11] Therefore, estimated worldwide overcharge damages totaled approximately $8 billion. Accounting for the time value of money over this ten-year conspiracy (between 1990 and 1999), we can calculate the real value of the damages to have been approximately $18 billion.[12] Offsetting these profits, the defendants paid a total of $2.2 billion in fines to the U.S., European, Canadian, and Australian competition authorities,[13] and an estimated $2.4 billion in civil settlements with U.S. purchasers.[14] Therefore, ignoring legal fees, the vitamins conspirators netted

at 19, available at http://www.agecon.purdue.edu/staff/connor/papers/SP_02_4.htm; OECD Report at 34, Annex A.

[11] John M. Connor, *Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement* (Nov. 2003) (Staff Paper # 03-12, Department of Agricultural Economics, Purdue University) ("Connor 2003") at 126, Appendix Table 6A, *available at* http://www.agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=11506&ftype=.pdf; Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, (Jan. 21, 2002) (working paper, University of Michigan Business School) ("Levenstein & Suslow (2002)") 50, Table 15, *available at http*://www-unix.oit.umass.edu/~maggiel/JEL-1-04.pdf.

[12] The present value of damages is calculated by pro-rating damages equally over the conspiracy period, and using a 1 percent premium over the annual prime rate to express damages in 2003 dollars.

[13] Fines are expressed in 2003 dollars, adjusted using a 1 percent premium over the annual prime rate, and calculated from the date of announcement of the fine. These numbers are consistent with estimates proffered in Petitioners' brief and the briefs for the Federal Republic of Germany and the United States as *amici curiae*. *See* Appendix A for a list of fines by defendant and jurisdiction.

[14] Settlements are expressed in 2003 dollars, assuming $2 billion in civil settlements paid out in 2002. *See* Brief for the United States as Amicus Curiae ("Government Brief") at 2. If there have been any civil damage recoveries in foreign courts, we are unaware of them.

approximately $13.6 billion in illegal worldwide profits despite having been caught.[15]

A more general point can be made here. For international cartels, treble damages within the United States are often insufficient to deter even violations that are caught with certainty. Suppose that the United States accounts for 25 percent of the relevant worldwide market for a product whose price is fixed. Further assume that the overcharge is $10 billion.[16] Under the extreme assumption (adopted here to simplify the illustration) that there is no punishment for colluding outside the United States, the gain from price fixing abroad is the whole amount of the overcharge, which equals $7.5 billion. Assuming that treble damages of $7.5 billion are imposed within the United States, the net loss from colluding in the United States is twice the U.S. overcharge, or $5 billion. Therefore, so long as government penalties and legal costs are under $2.5 billion, the conspiracy will make a net profit.[17] Clearly, in this case even U.S. treble damages are insufficient to cover the cartel's gains *ex post*. In practice, companies that are caught and prosecuted typically settle for much less than treble damages, so that the cartel's final

[15] This conclusion is not particularly sensitive to the assumed overcharge. Even with an assumed overcharge of 15 percent, the vitamins conspirators would have netted over $7.6 billion in illegal profits.

[16] This is assumed to include the lost time value of money, over the life of the cartel. Note that overcharges are often stated exclusive of the time value of money, a practice that can substantially understate the true loss to buyers.

[17] The conspirators' profits are not necessarily co-extensive with the harm that the conspiracy causes. In addition to the misallocation of resources from buyer to seller caused by overcharges, conspiracies produce other productive and dynamic harm because cartels tend to shelter their members from full exposure to market forces. Examples include limiting the incentive of participants to innovate or control costs. *See* OECD Report (2002) at 2.

profits may be a much larger proportion of the original overcharge.[18]

Empirical evidence on the excess profits earned by global conspiracies is difficult to obtain. Generally, studies estimate that the median overcharge is approximately 15 to 25 percent.[19] Successful global cartels affect a high volume of international commerce, and can cause substantial harm to consumers in the United States and other countries.

II. ECONOMIC LOGIC IMPLIES THAT, IN ORDER TO EFFECTIVELY DETER GLOBAL PRICE-FIXING CONSPIRACIES, CLAIMS BY FOREIGN CUSTOMERS SHOULD BE ALLOWED IN U.S. COURTS IN CASES INVOLVING SUCH CONSPIRACIES

A. Effective Deterrence Requires An Alignment Of The Geographic Scope Of The Cartelized Market With The Geographic Scope Of Enforcement.

In engaging in the analysis necessary to decide whether to form a cartel or not, participating firms balance their expected costs and the expected benefits of forming a cartel. Among the costs are the possible fines from detection and prosecution by antitrust authorities, the expected damages arising from civil litigation, and the potential losses arising from a price war if one or more members of the cartel are found to deviate from the cartel agreement. These costs will be weighted by the probability of a price war occurring and, in the case of legal penalties, of the cartel being detected and prosecuted.

[18] See Connor (2003) at 67-71 for a discussion of actual versus theoretical penalties imposed on international cartels.

[19] *See, eg.*, OECD Report (2002) at 9.

The expected benefits will depend in part on the firms' estimate of how market conditions and other factors will play out.

The example of the vitamins cartel in the previous section illustrated that in the case of an international cartel, the costs associated with detection and prosecution may be insufficient to deter the formation of the cartel because the conspirators can expect the cartel to make substantial profits even if it is detected. In making an *ex ante* decision on whether or not to engage in collusion, therefore, cartel members would take into account the fact that the penalties for detection and prosecution would not outweigh the profits they could reap from fixing prices.

This illustrates the general principle that, in situations where the geographic scope of the cartelized market exceeds the geographic scope of enforcement, remedies that are confined to purchasers in a single jurisdiction will likely be inadequate to deter cartel formation. This same principle explains why it is appropriate for the federal government to have the major responsibility for antitrust enforcement within the United States. The penalties embedded in U.S. antitrust laws are appropriate for domestic conspiracies because they presuppose an alignment of the scope of the cartelized market and the scope of enforcement. Allowing foreign claims in U.S. courts extends this principle to international conspiracies, establishing a level of deterrence comparable to what the current law achieves for domestic conspiracies.

B. Correctly Aligning The Geographic Scope Of Enforcement With The Geographic Scope Of The Cartelized Market Will Not Undermine The Deterrent Effect Of The Amnesty Program.

The Government's brief has expressed concern that allowing U.S. courts to hear claims based on all transactions affected by the same conduct, and not just domestic ones,

would reduce the incentives for conspirators to seek amnesty from criminal prosecution by the Department of Justice, and therefore reduce the number of conspiracies that are detected and prosecuted, thus weakening deterrence.[20] We believe that this concern is unfounded, for the following reasons.

1. The amnesty program cannot provide adequate incentives for deterrence unless penalties are commensurate with overcharges.

The prospect of larger damages may (but does not necessarily) reduce the *ex post* incentives for conspirators to seek amnesty. However, we have already seen that, even assuming that conspirators are prosecuted and pay full damages for domestic transactions, cartel members still stand to gain from engaging in price-fixing activity. Therefore, increasing the probability that an existing cartel would be caught and prosecuted through an amnesty program still would likely be insufficient to deter the formation of a cartel in the first place. An amnesty program that effectively deters cartel formation should result in *fewer* firms coming forward to report cartel behavior because there are fewer cartels to report.

2. With the scope of enforcement aligned with the scope of cartelized markets, the amnesty program can be expected to perform as well (in terms of providing incentives for disclosure) for international cartels as it currently performs for domestic cartels.

The Government's argument amounts to the assertion that, to improve the incentive effects of the amnesty program, it is desirable to moderate civil penalties by preventing certain victims of a cartel from suing. The Government has made this argument in the context of international conspiracies, where the entities prevented from suing would be foreign

[20] Government Brief at 20, 21.

purchasers. However, the logic of the government's argument, if correct, applies equally to domestic cartels. For example, the incentives in the amnesty program would be strengthened if, for cartels involving markets coterminous with the United States, victims located west of the Mississippi were precluded from suing. If allowing suits by all victims of domestic conspiracies does not significantly weaken the incentive effects of the amnesty program, and is judged on balance beneficial for antitrust enforcement, then similar treatment of international conspiracies should also not unduly weaken the incentive effects of the amnesty program to the point where antitrust enforcement is, on balance, weakened.

One might argue in response that the incentive effects of the amnesty program would differ for domestic and international conspiracies were suits by foreign purchasers permitted in U.S. courts, on the ground that international conspiracies are, on average, larger than domestic conspiracies. This argument is faulty in two respects. First, enlarging a conspiracy scales up both the costs and benefits from participating in the amnesty program. It does not systematically tip the balance in favor of the costs. Second, were this argument correct, it would at most require a slight modification of the previous paragraph's conclusion: if allowing suits by all victims does not significantly weaken the incentive effects of the amnesty program for *large* domestic conspiracies, and if it is judged on balance beneficial for antitrust enforcement in this context, then neither should it unduly weaken the incentive effects of the amnesty program for international conspiracies to the point where antitrust enforcement is, on balance, weakened.

3. The most important incentives for disclosure of active cartels are often non-pecuniary sanctions imposed on individuals, and these frequently overshadow the effects of pecuniary consequences for their corporations.

There are powerful non-pecuniary incentives to voluntary disclosure of conspiracies. Under the amnesty program, corporate executives and employees can avoid prison time and personal fines, and those individual interests can be at least as important as saving corporate money. Statements by Department of Justice officials have repeatedly emphasized this factor as a significant source of amnesty applications. The Antitrust Division's Director of Criminal Enforcement recently reported as follows:

> It is widely accepted, and it has certainly been our experience in the United States, that holding executives accountable for participating in cartel offenses by prosecuting them criminally and imposing jail sentences provides the greatest deterrent to these crimes. Because while cartel members may regard surcharges and fines as simply a cost of doing business, the loss of individual liberty is rarely viewed the same way. So it makes sense that the threat of incarceration is also the greatest inducement to self reporting and cooperation . . . .[21]

The current Deputy Assistant Attorney General in charge of criminal antitrust enforcement has similarly referred to "the

[21] Scott D. Hammond, *Beating Cartels at Their Own Game—Sharing Information in the Fight Against Cartels*, Speech by Director of Criminal Enforcement, Antitrust Division Before the Inaugural Symposium on Competition Policy by the Competition Policy Research Center Fair Trade Commission of Japan, at 13-14 (Nov. 20, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201614.pdf; *see also* Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom*, Speech by Director of Criminal Enforcement, Antitrust Division Before the Fifteenth Annual National Institute on White Collar Crime of the American Bar Association Criminal Justice Section, at 8, 10 (Mar. 8, 2001), *available at* http://www.usdoj.gov/atr/public/ speeches /7647.pdf (noting the incentives to a company's seeking amnesty arising from "potentially devastating consequences on its executives" and the business disruptions caused by "having key members of your senior management . . . indicted and labeled as international fugitives").

stunning incentives and rewards to companies *and their executives* that take advantage of the Amnesty Program," going on to refer to instances when "the amnesty applicant paid zero dollars in criminal fines, and its cooperating executives received nonprosecution protection."[22]

4. Any reduction in the frequency of disclosure due to the amnesty program would be offset by an increase in detection resulting from victims' incentives.

There would be a potentially offsetting increase in the incentives of victims to investigate and bring private antitrust actions. That is, even if we make the unlikely assumption that antitrust authorities might discover significantly fewer conspiracies because of a decrease in leniency applications, the international victims themselves would likely discover more international conspiracies if allowed to collect damages.[23] Thus, it is by no means clear that allowing foreign claims will lead to a decrease in detection of conspiracies.

[22] James M. Griffin, *A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, Speech by Deputy Assistant Attorney General, Antitrust Division Before the American Bar Association Section of Antitrust Law Annual Meeting, at 8 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201477.pdf (all italics in original).

[23] *See* Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel* (Dec. 2002) (Working Paper 02-13, AEI-Brookings Joint Center for Regulatory Studies), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php?id=218 at 2; *see also* Salil K. Mehra, "*A*" *is for Anachronism: The FTAIA Meets the World Trading System*, 107 Dick. L. Rev. 763, 770 (2003) ("[T]he private right of action encourages private plaintiffs to aid and inform government enforcement agencies—thus providing a force-multiplier to those agencies' own resources.")

C. Allowing Foreign Claims In U.S. Courts Will Not Result In Over-Deterrence.

One possible concern with allowing foreign claims in U.S. courts is that this might result in a situation of inefficient over-deterrence. For instance, it may be argued that the threat of greater legal penalties could serve to chill socially beneficial interaction between firms (*e.g.*, in standard-setting bodies). We believe this concern is unfounded for the following reasons.

1. By aligning the scope of enforcement with the scope of cartelized markets, allowing foreign claims in U.S. courts simply brings deterrence for international conspiracies in line with deterrence for U.S. domestic conspiracies.

As we have argued above, in the absence of adequate penalties for transactions outside the United States, firms in an international market face a lower incentive against forming a cartel than do firms in a purely domestic market. Given that the ratio of damages to awards in the case of domestic cartels is intended to balance the costs and benefits of deterrence, and that the law does not envision differential treatment for large and small conspiracies, increasing the penalties to international cartels would do no more than bring on par the treatment of domestic and international cartels. In other words, given that the Sherman Act regulates behavior between domestic firms as it pertains to U.S. commerce, an assertion that permitting claims against foreign firms that include U.S. commerce within the scope of their activity would result in over-deterrence is equivalent to claiming that the activity of these firms within the United States is currently being over-deterred.

2. A regime limited to domestic victims would be characterized by under-deterrence, not over-deterrence.

In our view, U.S. antitrust remedies do not over-deter interaction between firms. Indeed, the evidence supports the

view that there is under-deterrence of price fixing unless foreign victims are also allowed to sue.

It is estimated that most cartels have only a 10 to 30 percent chance of being discovered.[24] Thus, *ex ante* expected profits are even higher than they would be once a cartel has been caught, further widening the gap between the costs and benefits of cartel formation. To return to the example above, suppose now that the prospective cartel members are evaluating the decision to collude *ex ante*, and suppose that the maximum probability of detection is 33 percent. Maintaining the assumption that no penalties are imposed outside the United States, the expected costs of cartel formation are now the treble damages times the probability that the cartel will be caught and prosecuted, or $2.5 billion. The net expected profit from cartel formation (abstracting from uncertainty on the benefit side) goes up to $7.5 billion—the full amount of the foreign overcharge.

Given that more than two-thirds of cartel activity goes undetected and unpunished, it is clear that the *ex ante* deterrence of cartel behavior is too weak to deter the vast majority of international cartel activity unless foreign claims are allowed. Allowing foreign claims in U.S. courts would directly reduce the size of the gap between cost and benefit by making the expected costs of forming a cartel substantially

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[24] *See* Connor (2003) at 63, n. 68; See also Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 Rev. Econ. & Stat. 531, 535 (1991) (estimating the probability that a price-fixing conspiracy will be prosecuted by federal authorities to be at most between 13 and 17 percent in a given year). As with estimates of the overcharge, there is limited empirical evidence to determine the number of cartels that are uncovered. Cohen and Scheffman argue that the detection probability for antitrust crimes is probably similar to that for other regulatory and business crimes, which other studies have estimated to be of the order of one in four to one in three. *See* Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs ?*, 27 Am. Crim. L. Rev. 331, 348 (1989).

larger than they currently are.[25] To quote an official of the Department of Justice:

> Since cartels are essentially covert conspiracies, their detection and prosecution will always be difficult, and so the probability of getting caught will not be very high. It is apparent, based on this way of thinking about deterrence, that simply taking away the illegal profits will not suffice to deter antitrust violations by corporate conspirators, since a firm, even if caught, would be no worse off than before it started, while if it were able to avoid detection, it could profit handsomely. Instead, penalties must be significantly greater than the expected rewards of cartel participation.[26]

One indicator of the weakness of deterrence in the absence of foreign victims' claims is the number of recently prosecuted cartel participants that are repeat offenders. Well known examples include Hoffmann-La Roche (vitamins, citric acid), Aventis (vitamins, methionine, methyl glucamine), ADM (lysine, citric acid), Akzo (sodium gluconate,

[25] There is a large literature on optimal deterrence, which points out that the optimal deterrent is usually a number substantially higher than the actual harm, to account for the fact that many cartels go undetected. For example, the OECD observes that "[b]ecause not all cartels are detected, the financial sanction against one that is detected should exceed the gain actually realised by the cartel. Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six. A multiple of three is more commonly cited, however." *See* OECD Report (2002) at 3.

[26] Stuart M. Chemtob, *Antitrust Deterrence in the United States and Japan*, Remarks by Special Counsel for International Trade, Antitrust Division at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, at 3 (June 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/5076.pdf.

choline, monochloroacetic acid and sodium monochloroacetate), and a host of others.[27]

D. Increasing The Legal Penalties For Cartel Formation Will Not Reinforce Cartel Behavior.

Another potential concern is that increasing the severity of legal remedies might in theory help firms maintain price discipline once a cartel is formed by providing them with a more powerful tool for punishing members who attempt to lower prices unilaterally. The logic of cartel formation requires that firms enforce coordinated behavior (*i.e.*, price-fixing) by "punishing" firms that deviate from the cartel's joint decision, usually through price wars or other loss-inducing tactics. In theory, if the non-cheating members of a cartel punished cheaters by disclosing their anticompetitive practices to antitrust authorities (in return for amnesty or a reduced sentence), an increase in potential civil remedies could make these punishments more severe, thereby dissuading firms from cheating in the first place.

We note, however, that informing on the cartel to authorities is a punishment that in practice is unlikely to be used in situations where a cartel member is found deviating from the price-fixing agreement (as opposed to a situation where firms may be under investigation). Research on the incentives to sustain cartel behavior suggests that firms will typically punish other firms through means that preserve the

[27] *See* e.g. Griffin (2003) at 7 and the case filings and press releases of the Department of Justice and other authorities at, among others, http://www.usdoj.gov/atr /cases/f1000/1077.htm; http://www.usdoj.gov/atr/cases/f2400/2452.htm; http://www.usdoj. gov/atr/cases/f0900/0918.htm; http://europa.eu.int/rapid/start/cgi/guesten. ksh?p_action.gettxt=gt&doc=IP/02/1746|0|AGED&lg=EN&display=; http://europa.eu.int/rapid/start/cgi/ guesten.ksh?p_action.gettxt=gt&doc= IP/02/976|0|AGED&lg=EN&display=; http://cb-bc.gc.ca/epic/internet/ incb-bc.nsf/vwGeneratedInterE/ct027 11e.html.

possibility of future collusion, rather than by "ending the game" through informing the authorities.[28] For instance, firms will often engage in periods of price wars before returning to price fixing.[29]

E. Aligning The Geographic Scope Of Enforcement With The Geographic Scope Of Cartelized Markets Will Not Flood U.S. Courts With Claims By Foreign Plaintiffs.

The concern has also been expressed that extending U.S. antitrust laws to foreign transactions would flood U.S. courts with foreign plaintiffs. In our view, however, this concern is unwarranted for the following reasons.

1. The scope of allowable claims would be limited.

Although a substantial number of foreign claims would potentially qualify under the principles we propose (hard-core horizontal conspiracies with foreign transactions that are within the same relevant market as affected U.S. transactions), many more would be excluded. For instance, one recent study found that, by number, the vast majority of cartels operate within a nation's boundaries.[30]

Limiting the scope of U.S. antitrust law to claims derived only from transactions in relevant markets that include the United States would increase the number of claims only to the

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[28] *See* Dilip Abreu, David Pearce, & Ennio Stacchetti, *Optimal Cartel Equilibria with Imperfect Monitoring*, 39 J. Econ. Theory 251 (1986); Dilip Abreu, David Pearce, & Ennio Stacchetti, *Toward a Theory of Discounted Repeated Games with Imperfect Monitoring*, 58 Econometrica 1041 (1990).

[29] For instance, see the discussion in Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?* (Jan. 2004) *available at* http://www.unix.oit.umass.edu/~maggie1/JEL-1-04.pdf. at 10-13 of cartels which cycled in and out of collusion, sometimes over long periods of time.

[30] *See* OECD Report (2002) at 7-8.

extent necessary to deter the formation of international cartels that substantially and directly affect U.S. consumers and businesses. At the same time, it will necessarily exclude "purely foreign" conspiracies—those conspiracies where the conduct and anticompetitive effects occur only in foreign countries—from the ambit of U.S. antitrust law.

2. With more effective deterrence, there will be fewer legitimate claims of price fixing.

Concerns regarding an explosion in the number of cartel prosecutions in U.S. courts ignore the fact that the primary focus of antitrust law should be on *ex ante* deterrence. When the scope of enforcement and cartelized markets are improperly aligned, deterrence is insufficient and ineffective. Bringing remedies in line with the harm caused by international cartels will lead to fewer cartels being formed, and hence fewer claims that can legitimately be brought by foreign plaintiffs in U.S. courts.

CONCLUSION

In examining the deterrent effect of U.S. antitrust law on the formation of international cartels, we find that there is frequently inadequate protection of the welfare of U.S. consumers. The current level of criminal and civil remedies is often not sufficient to deter cartel formation in large international markets, leading to a situation where firms that operate in these markets can cause substantial harm to U.S. consumers. Focusing on *ex ante* deterrence is critical given the extent to which cartels may go undetected and unpunished. Hence, the economists joining this brief believe that economic logic counsels allowance, in U.S. courts, of price-fixing claims derived from foreign transactions that are

within the same relevant market as affected U.S. transactions in order to preserve the deterrent effect of U.S. antitrust law for U.S. consumers and businesses.

Respectfully submitted,

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APPENDIX

APPENDIX

Vitamins Fines Imposed By U.S. And Foreign Antitrust Authorities, In Millions Of U.S. Dollars

Defendant	United States	Europe	Canada	Australia	Total
Roche	$500	$410	$32	$8	$951
BASF	$225	$263	$13	$4	$505
Rhône-Poulenc	Amnesty	$4.5	$9	$2	$16
Takeda	$72	$33	$34		$108
Eisai	$40	$12	$1.4		$53.1
Daiichi	$25	$21	$1.7		$47.5
Merck	$14	$8	$0.7		$22.9
Degussa	$13		$1.6		$14.6
Lonza	$10.5		$0.7		$11.2
Nepera	$4		$0.2		$4.2
Reilly	$2		$0.02		$2.0
Bioproducts	Amnesty				$0.0
Chinook	$5		$1.5		$6.5
Ducoa	$0.5				$0.5
Solvay		$8			$8.1
Hoecsht			$0.3		$0.3
Totals	$911	$760	$66	$14	$1,751

Source: DOJ Press releases, 1999-2002; CCB news releases, 1999-2002; ACCC news release, February 28, 2001; EC Press Release, November 21, 2001; Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of Anti-Cartel Laws: Evidence from the International Vitamins Cartel* (Dec. 2002) (Working Paper 02-13, AEI-Brookings Joint Center for Regulatory Studies).

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BRIEF OF *AMICI CURIAE* ECONOMISTS JOSEPH E. STIGLITZ AND PETER R. ORSZAG IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. ANTITRUST POLICY DEPENDS ON DETERRING THE "SUPREME EVIL" OF HARD-CORE CARTELS. 6

II. DETERRING GLOBAL CARTELS REQUIRES ELIMINATING EXPECTED GLOBAL PROFITS. 8

III. INADEQUATE DETERRENCE OF GLOBAL CARTELS UNDERMINES DETERRENCE OF DOMESTIC PARTICIPATION IN SUCH CARTELS. 12

IV. STRENGTHENING DETERRENCE OF GLOBAL CARTELS PROTECTS U.S. CONSUMERS. 18

V. COUNTER-ARGUMENTS DO NOT OUTWEIGH THE INCREASED DETERRENCE FROM ALLOWING SUITS ON FOREIGN TRANSACTIONS. 21

CONCLUSION 29

TABLE OF AUTHORITIES

Pages

Cases

Empagran S.A. v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (CADC 2003) 16, 20

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INTEREST OF *AMICI CURIAE*[1]

Amici are economists with a long history of involvement in public policy. They are interested in this matter based on their professional and public concern that antitrust policy be based on sound economics and on recognition of the interaction between domestic and foreign components of global cartels.

Joseph E. Stiglitz is Professor of Economics at Columbia University and the co-winner of the 2001 Nobel Prize in Economic Sciences. Previously, Dr. Stiglitz served as the World Bank's Chief Economist and Senior Vice President for Development Economics and, before that, as the Chairman of

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the President's Council of Economic Advisers. In 1979, the American Economic Association awarded Dr. Stiglitz its biennial John Bates Clark Award, given to the economist under 40 who has made the most significant contributions to economics. His work has also been recognized through his election as a fellow to the National Academy of Sciences, the American Academy of Arts and Sciences, and the American Philosophical Society, as well as his election as a corresponding fellow of the British Academy.

Peter R. Orszag is the Joseph A. Pechman Senior Fellow in Economic Studies at The Brookings Institution. Dr. Orszag is co-editor of AMERICAN ECONOMIC POLICY IN THE 1990S (2002), co-author of PROTECTING THE AMERICAN HOMELAND (2003), and co-author of SAVING SOCIAL SECURITY (2004). He previously served as Special Assistant to the President for Economic Policy at the White House and as Senior Economist and Senior Adviser on the President's Council of Economic Advisers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are economists with policy experience. This brief addresses the economic and policy rationales for allowing foreigners harmed by global cartels to file suits in the United States. While this brief does not directly address the legal arguments concerning the jurisdictional scope of the U.S. antitrust laws, insofar as those laws do not expressly forbid the types of suit at issue in this case, such suits would substantially further the economic and policy goals that lie at the heart of U.S. antitrust law and thus they should be permitted if at all possible under the governing statutes. The economic and policy rationales for allowing such suits include:

(1) cartels are the "supreme evil of antitrust," and deterring them is one of the most fundamental policy objectives of federal antitrust laws;

(2) effective deterrence of the formation of international cartels requires that the total expected penalty (which is equal to the probability of detection and conviction multiplied by the penalty) be at least equal to aggregate profits from the collusive activity, so deterrence of global cartels requires penalties that at least equal the global profits from colluding; and

(3) failing to provide an effective deterrent against global cartels undermines protection against antitrust abuses within the United States itself.

A deterrence perspective thus suggests that it would substantially further the underlying goals of U.S. antitrust law to allow private civil suits by foreign plaintiffs in the United States, even when such suits seek recovery based on foreign transactions by the global cartel. Such suits would help to protect American consumers against the potential harms of international cartels that have a not insignificant anticompetitive effect in the United States.

A cartel arises when producers agree either to limit production or to fix prices. That type of conspiracy is widely regarded as the most destructive form of antitrust violation. Given the substantial economic costs associated with cartels and the practical difficulties in detecting them, sound policy lying at the heart of federal antitrust law involves preventing them from forming in the first place. The federal antitrust laws therefore attempt to deter harmful cartel behavior by imposing severe penalties, both criminal and civil, on those found guilty. The effectiveness of such deterrence depends on the expected penalty, which in turn is determined by the probability of detection and conviction multiplied by the size of the penalty if convicted.

Global cartels are estimated to impose costs amounting to many billions of dollars per year on consumers in the United States and abroad. To deter such cartels efficiently, it is imperative that the expected penalty reflect the *global* activities of the cartel. The scope of the penalty should correspond to the full scope of the cartel.

The relevant expected penalty depends on the sum of the expected penalties in each nation. If that aggregate expected punishment is smaller than the sum of the profits garnered in each nation, deterrence of the global cartel is inadequate and consumers everywhere will be harmed. Despite recent progress in strengthening penalties against cartels abroad (which may in part reflect a response to relatively more effective antitrust policies in the United States), sanctions on a global basis "are, on the whole, still inadequate." ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD 3 (2003) ("HARD CORE CARTELS").

Insufficient deterrence of global cartels hurts consumers in the United States as well as abroad. The reason is that a large international cartel in a global market will typically have to include the United States – even assuming some probability of detection and disgorgement of U.S.-based profits – or risk having its *foreign* profits undermined by arbitrage from trade between the U.S. market and the cartelized foreign markets. Insufficiently deterring cartels in global markets thus can be harmful to U.S. consumers, even if the expected penalty within the United States would be sufficient to deter a purely domestic cartel that directly profited only from U.S. transactions. Global cartels would continue to operate in the United States even at a potential expected loss from such operations because such a cartel must typically include the United States within its scope of operations in order to survive.

The result of such interdependence between U.S. operations and a cartel's foreign profits is that the deterrent required to prevent a global cartel from including the United States is generally larger than the deterrent required to prevent a purely domestic cartel from forming. Because an international cartel will look to its total expected profits from all markets, foreign profits generally can be used to subsidize necessary U.S. operations in order to maximize total global

profits even where such U.S. operations, viewed in isolation, would be unprofitable alone. This conclusion is strengthened by the recognition that international cartels are particularly difficult to detect and prosecute. Assuming a lower probability of successfully detecting and convicting in each and every market a cartel operating in international markets relative to the probability of detection and conviction for a purely domestic cartel operating in a single market, the penalty conditional on conviction must be increased just to provide the same level of deterrence against harm imposed solely in the United States itself.

Failing to penalize global cartels for the harm they impose and profits they reap abroad thus would undermine one of the most fundamental objectives of the U.S. antitrust laws – using deterrence to discourage cartel formation in the United States. Adopting a more expansive view of the jurisdictional reach of U.S. antitrust laws, on the other hand, would raise the total expected penalty, relative to the penalty based solely on U.S. transactions. Such an increased penalty would more effectively offset the synergistic international profits generated by inclusion of the United States in the cartel's scope. The result would be more effective deterrence against global cartels operating in the United States, along with more effective deterrence abroad.

In summary, the Supreme Court has correctly emphasized the paramount role of the antitrust laws in deterring collusion, as opposed merely to providing recovery to injured parties. Such a deterrence perspective underscores the benefits of a more expansive view regarding the applicability of federal antitrust laws to global cartels that affect U.S. economic welfare.

Failing to allow private suits by foreign plaintiffs harmed by global cartels that also operate in the United States, even when such claims involve the foreign losses imposed by the global cartel, would undermine the efficacy of the antitrust

laws in protecting American consumers against the evils of cartels.

ARGUMENT

I. ANTITRUST POLICY DEPENDS ON DETERRING THE "SUPREME EVIL" OF HARD-CORE CARTELS.

A bedrock premise of U.S. antitrust law is that cartels represent a fundamental economic evil that the federal government can and should prevent. Cartels increase prices above competitive levels, thereby transferring resources from consumers to the colluders and typically impeding economic efficiency. This Court has correctly referred to collusion as "the supreme evil of antitrust." *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, -- U.S. --, 124 S. Ct. 872, 879 (2004). The Organisation for Economic Co-operation and Development ("OECD") concurs: "[H]ard core cartels are the most egregious violations of competition law." OECD Council, *Recommendation Concerning Effective Action Against Hard Core Cartels* (March 25, 1998 – C(98)35/FINAL) (available at http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/287EEB70E8B80915C1256E5800028BA4?OpenDocument).

In addition to transferring wealth from customers to the colluding firms, cartels can undermine economic efficiency in two ways: They generate a static welfare loss from artificially inflating the price of a good, and they cause a dynamic loss from the diminution of competitive pressures and innovation. Estimates suggest that just the static deadweight efficiency loss from the global vitamins cartel alone could amount to $50 million to $100 million *per year* in the United States. Jonathan B. Baker, *The Case for Antitrust Enforcement*, J. ECON. PERSPECTIVES 27, 43 (Fall 2003).

Given the substantial costs that cartels impose on consumers and economic efficiency, economists have long argued that public policy should be designed to prevent the cartels from occurring in the first place. As one leading antitrust economist has emphasized, "[i]t is obvious that there can be a large gain to society from preventing such cartels, rather than waiting until they form, uncovering them and punishing the participants." Dennis W. Carlton, *The Proper Role for Antitrust in an International Setting*, Keynote Address, Second Annual Conf. of the Int'l Competition Network, at 3 (June 25, 2003) (Prof. Economics, U. Chicago).

Antitrust laws attempt to deter cartels by imposing substantial penalties on firms convicted of colluding. The primary economic benefit from those antitrust penalties is not their *ex post* effect in providing compensation to those injured by cartels, but rather their *ex ante* effect in deterring the collusion in the first place. From an economic policy perspective, the antitrust laws should be interpreted primarily as a mechanism for averting collusive activity. The antitrust statutes are the "most effective brake against the cartelization of industry." THURMAN ARNOLD, FAIR FIGHTS AND FOUL 120 (1951).

The strength of the deterrence depends on the *expected* penalty, which is equal to the probability of detection and conviction (p) multiplied by the fine if convicted (F). To dissuade cartels from forming, the expected penalty (pF) must be at least equal to the cartel's expected profits.

Any given expected penalty (pF), and thus any given level of deterrence, can be obtained through various combinations of p and F. In the presence of enforcement costs (including the costs of gathering evidence and prosecuting cases), the optimal structure of sanctions is a small p combined with a large F. This approach deters colluders with minimal administrative costs. Gary S. Becker, *Crime and Punishment: An Economic Approach*, J. POL. ECON. 169, 183-184 (Mar.-Apr. 1968) (deterrence of the risk-neutral and risk-averse).

In the United States, the sanctions imposed on colluding firms can include criminal fines and the possibility of impris-

onment for executives. In addition, private parties can be awarded up to three times the amounts by which they were injured. This treble damages multiple compensates for a detection and conviction probability (p) that is well under one. The difficulty of detecting, let alone convicting, cartels is reflected in the fact that many of them persist for years, if not decades, without antitrust intervention. For example, one study found an average duration of international cartels in the 1990s of six years; some had persisted for two decades before being stopped. Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECONOMY 1221, 1226 (2001). The vitamins cartel that is the focus of the immediate case operated for a full decade.

Given a probability of detection and conviction that is well under one, the treble damages remedy is seen as a rough approximation to the optimal fine F. ("Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six. A multiple of three is more commonly cited, however." OECD, HARD CORE CARTELS, at 27; *see also* ANDREW I. GAVIL, WILLIAM E. KOVACIC, & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 1044 (2002).) As discussed below, the probability of detection and conviction for a global cartel may be even lower than for a purely domestic cartel, requiring a higher fine in order to provide an effective deterrent.

II. DETERRING GLOBAL CARTELS REQUIRES ELIMINATING EXPECTED GLOBAL PROFITS.

In recent years, very large global cartels have increasingly attracted the attention of antitrust authorities. In addition to the vitamins cartel, other well-known international cartels have affected markets in lysine, graphite electrodes, and carbonless paper. Based on a survey of such cases, the OECD estimates that the "total harm from cartels is significant in-

deed, surely amounting to many billions of dollars each year." OECD, HARD CORE CARTELS, at 9.

To deter global cartels, the expected penalty must be at least equal to the *global* profits generated by the cartel. The relevant expected penalty depends on the sum of the expected penalties in each nation. If that aggregate expected punishment is less than the sum of the increased profits captured from consumers in each nation, collusion in *all* nations will be inadequately deterred.

For simplicity, assume that the world comprises two countries (country A and country B) with open trade between them. Consider what expected penalty is then required to deter a global cartel that operates in both countries. Assume that the collusive activities generate $50 of profits both in country A and in country B, for a total of $100 globally. The expected sanctions in A and B combined must then total at least $100 to deter the global cartel. If the total global expected sanctions are less than $100, the cartel will form.

In particular, even if country A imposes an expected penalty of $50 (equal to the profit generated from consumers in country A), the global cartel would not be deterred in the absence of a $50 expected penalty in country B. The total profits earned by the cartel ($100) would exceed the total expected penalties ($50); as a result, the cartel would not be deterred and consumers in both country A and country B would be harmed.

The conclusion is that, even if a given expected penalty in a specific country were sufficient to deter a purely domestic cartel from forming, the expected penalty may be insufficient to deter a global cartel from forming. Deterring a global cartel efficiently requires that the *global* expected penalty equal the global gain to the cartel.

This perspective underscores the importance of examining the strength of antitrust systems in other countries to evaluate whether global cartels are likely to be deterred by global ex-

pected penalties under current conditions. Historically, the United States has been one of the few nations in the world with strong antitrust enforcement: "For many decades, the United States stood almost alone in the world in its commitment to antitrust enforcement * * *." International Competition Policy Advisory Comm. to the Attorney General and Ass't Attorney General for Antitrust, *Final Report* 185 (2000) ("*ICPAC Final Report*").

Other industrialized economies have recently strengthened penalties against cartels, which may in part reflect a response to the effectiveness of U.S. policies:

> Although U.S. antitrust enforcement has been criticized for being aggressively unilateral, it has, in fact, stimulated positive responses from other jurisdictions. Indeed, it is difficult to believe that we would see the international flowering of interest in antitrust * * * had the United States not asserted its jurisdiction over international competition matters in the first place.

Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 732 (2001).

Despite recent progress in improving antitrust protections abroad, however, severe weaknesses remain. The OECD recently has undertaken a multi-year study of the cartel laws in its member countries, which showed that:

1. The antitrust laws in most OECD countries allow for large fines against colluding firms, but the fines actually imposed are often modest.
2. Individuals can be fined in less than half of the OECD countries. Between 1996 and 2000, only four OECD countries imposed such fines.
3. Individuals can be imprisoned for collusive activities in a minority of OECD nations. Between 1996 and 2000, only the United States and Canada actually imprisoned individuals for their cartel-related activities.
4. Fewer than half of OECD countries permit the recovery of damages by victims of cartels. This is a common practice only in the United States, and the maximum permissible recovery amount is often more modest abroad.

OECD, *Hard Core Cartels – Harm and Effective Sanctions* 3 (Policy Brief, May 2002) ("*Hard Core Cartels Policy Brief*").

The OECD reached a firm conclusion: "Available data indicate that sanctions actually imposed have not reached the optimal level for deterrence. * * * [I]t must be concluded that, while there is a distinct, if uneven trend toward more rigorous sanctions in cartel cases, available data indicate that larger sanctions are required to achieve effective deterrence." OECD, *Hard Core Cartels Policy Brief*, at 3.

Furthermore, the strength of anti-cartel enforcement outside the OECD is generally much weaker than within the OECD. As one recent study noted,

> there has been little activity on the part of developing country governments or developing country consumers to respond to these [international] cartels even after they have been shown to exist. * * * There are a variety of reasons – legal, political, and economic – why this may be the case. But * * * a lack of impact on developing countries is probably not one.

Margaret Levenstein, Valerie Suslow & Lynda Oswald, *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies*, William Davidson Working Paper No. 538, at 3 (The William Davidson Inst., U. Mich. Bus. Sch., Feb. 2003). High fixed costs of bringing antitrust actions mean that even if a developing country had the administrative and legal framework with which to bring antitrust actions, were recovery limited to damage within the country, it would not be economically

practicable to bring antitrust actions. Efficient deterrence requires the concentration of antitrust actions in the economies most affected.

Amici's conclusion is that current global sanctions are simply insufficient to deter global cartels.

III. Inadequate Deterrence of Global Cartels Undermines Deterrence of Domestic Participation in Such Cartels.

The lack of an effective deterrent against international cartels imposes harm not just on the global economy, but also on the U.S. economy. An international cartel's decision to operate in the United States will be based not solely on the domestic costs and benefits of such operation, but on the synergistic *international* costs and benefits of U.S. operations. Ensuring sufficient deterrence of international conspiracies is thus sound policy even from the more constricted perspective of maximizing the welfare of the American public, in addition to the broader perspective of maximizing global welfare.

The hypothetical example from the previous section illustrates the point. Since the expected penalty in country A is equal to the harm imposed on consumers in country A, would not the cartel be deterred from operating in country A? The answer is often no, since a prospective cartel in a tradable good may have to operate in both countries to succeed in raising prices in either country.

To see why, suppose the cartel operates only in country B. Then the price for the good would be higher in country B than country A, and arbitrageurs would ship the good from country A (where it can be purchased at the competitive market price) to country B (where it sells above that competitive market price). The arbitrage would undermine the cartel's market power in country B, driving down the price in country B. The basic conclusion is that in global markets, the cartel must

generally operate in *both* country A and country B to be successful.

While the existence of trading frictions, such as transportation costs and tariffs, might allow a higher price in country B even absent cartel operations in country A, such costs tend to be modest for the types of goods that have been cartelized in the recent past (including, for example, vitamins and lysine). Tariffs on industrial goods have been declining, and will average only about four percent by 2005. OECD, *The Doha Development Agenda: Tariffs and Trade* 2 (Policy Brief, Aug. 2003). Freight and insurance costs for industrialized countries tend to be under 5 percent on a value-weighted basis. IMF, International Fin. Stats. Yearbook 1039 (2002) (2001 data showing U.S. imports on a CIF (cost-insurance-freight) basis and an FOB (free-on-board) basis, with the difference representing transportation costs of 3.3%); *id.* at 499 (same for Germany showing 2.8% costs); *id.* at 1031 (1997 data for United Kingdom showing 2.2% costs); IMF, Direction of Trade Stats. Yearbook 3 (2002) (2001 data for world imports showing 3.6% average costs). Even if trading costs were *twice* as large as these estimates, such costs would be much smaller than the price mark-ups associated with many international cartels.[2]

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[2] The international lysine cartel is alleged to have raised prices by 70 percent in its first six months of operation, and the international vitamins cartel supposedly raised the price of Vitamin C by over 30 percent. Antitrust Division, DOJ, *Status Report: International Cartel Enforcement* 1-2 (Feb. 2002) (available at http://www.usdoj.gov/atr/public/criminal/9939.pdf); Carlton, *The Proper Role for Antitrust*, at 3 (Vitamin C prices raised over 50 percent). Some multinational cartels have even resulted in price mark-ups as high as 100 percent. William J. Kolasky, *Antitrust Compliance Programs: The Government Perspective*, Speech presented at the Corporate Compliance 2002 Conference, Practising Law Institute, at 3 (July 12, 2002) (Deputy Ass't A.G., Antitrust Div., DOJ) (available at http://www.usdoj.gov/atr/public/speeches/11534.pdf).

The smaller the trading frictions, the more international the relevant market and the more necessary it will be for a global cartel to include the United States within its operations. *Amici*'s conclusion is that real-world frictions are (almost by definition) too small in global markets to allow a cartel to exclude major trading partners while sustaining the types of price increases that are the objective of international cartels. In particular, because of the relative size of the U.S. economy, cartels in global markets thus often will have to operate in the United States, regardless of whether U.S. operations will generate independent prospective gains, in order to be successful. (The United States represents a substantial share of the world market for many types of goods and services. U.S. Gross Domestic Product represented approximately 21 percent of world-wide GDP in 2002. IMF, *World Economic Outlook* 164 (September 2003) (Table A) (available at http://www.imf.org/external/pubs/ft/weo/2003/02/pdf/appendix.pdf).

Inadequate deterrence of cartels in low-friction global markets on an international basis thus implies inadequate deterrence of such cartels within the United States. In other words, in evaluating the deterrent to international cartels operating in the United States, it is invalid to compare the expected penalty for harm imposed solely on U.S. consumers to the expected profit that the cartel could earn solely from U.S. consumers. The reason is that preventing arbitrage from the U.S. market may be a lynchpin to the success of the global conspiracy as a whole. Even if the expected penalty for harm caused in the United States were equal to or greater than the expected profits earned within the United States, the cartel could still have an incentive to operate in the United States in order to facilitate profits abroad. Cartel operations in the U.S. thus can have the effect of sustaining higher cartel prices and profits abroad, separate and apart from the expected gains from U.S. transactions alone.

The challenge of deterring a global cartel is also highlighted by other incentives for the cartel to include an additional market within its scope. Including one more market in the global cartel may strengthen the ability of the cartel to prevent defection. As the number of national markets in which a global cartel operates increases, "each cartel member can be more successfully deterred from cheating on the cartel agreement in *any one market* by the threat of retaliation by other members in *all the markets* in which the cartel operates." Evenett, *et al.*, 24 WORLD ECONOMY at 1237 (emphasis in original). In other words, the addition of one more market may expand the ability of the cartel to discipline its members in other markets. Again, the conclusion is that the typical deterrent rule applied in a purely domestic setting may not be sufficient to deter a global cartel from entering the domestic market, and operations in the domestic market can have the effect of sustaining cartel discipline, and hence profits, in operations abroad.

The courts have recognized the adverse effects on domestic markets from insufficiently deterring global cartels. For example, this Court concluded in *Pfizer, Inc.* v. *Government of India* that

> [i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

434 U.S. 308, 315 (1978) (footnote omitted).

The United States Court of Appeals for the D.C. Circuit reached a similar conclusion below:

> Even assuming, *arguendo*, that the antitrust laws are only intended to protect selfish national interests, suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies. * * * [I]f foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability.

Empagran S.A. v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 356 (CADC 2003).

The adverse effect on U.S. economic welfare is exacerbated because global cartels, once they form, are particularly difficult to detect and prosecute. As one Justice Department official has emphasized, "The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. * * * [T]hey went to great lengths to cover up their actions – such as using code names with one another, meeting in secret venues around the world, creating false 'covers' – *i.e.*, facially legal justifications – for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy." William J. Kolasky, *Antitrust Compliance Programs: The Government Perspective*, Speech before the Corporate Compliance 2002 Conference, PLI, at 4-5 (July 12, 2002) (Deputy Ass't A.G., Antitrust Div., DOJ) (available at http://www.usdoj.gov/atr/public/speeches/11534.pdf).

The relatively low probability of detecting and convicting a global cartel (compared to a purely domestic one) makes the formation of such cartels more likely. As a result, the absence of an effective global deterrent further undermines protection against antitrust abuses within the United States itself.

Several features of international cartels make detection and conviction especially challenging. First, cartel members can meet and retain records outside the jurisdiction of U.S. authorities. As a result, it may be difficult for U.S. antitrust agencies to obtain the information necessary to prosecute a cartel. Indeed, the failure of the United States government in the early 1990s to obtain a criminal conviction against participants in an alleged international cartel in industrial diamonds is commonly attributed to the difficulties in compelling evidence from foreign nationals. Spencer Weber Waller, *Anticartel Cooperation*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 104 (S. Evenett, A. Lehmann, and B. Steil, eds., 2000). Although the United States has entered into various cooperative arrangements with authorities in other countries, those agreements typically do not require the sharing of all information nor do they compel foreign witnesses to cooperate fully with U.S. investigations. Some observers believe that impediments to prosecuting international cartels can almost eliminate the probability of detection and conviction. Evenett, *et al.*, 24 WORLD ECONOMY at 1237.

Second, even with full information sharing and cooperation among international authorities, the nature of international markets and legal systems may impede enforcement efforts. Differences in reporting requirements and legal frameworks across nations, the ability of cartel members to use official export and import data to monitor activities of other members, and the use of trade associations to disguise cartel meetings, complicate the ability of antitrust authorities to pursue global cartels relative to purely domestic ones. Moreover, the seemingly innocuous use of national bounda-

ries to mask collusive agreements to divide world markets is a particular challenge: It would be extremely difficult to detect a cartel that operated by dividing a global market into exclusive national markets.

Those factors tend to reduce the probability of detection and conviction (p) for a global cartel relative to a purely domestic one. As a result, the penalty conditional on conviction (F) for global cartels must be increased, relative to the fine imposed on a purely domestic cartel that exerts an equally adverse effect on the domestic market, just to provide the same level of deterrence (pF) against harm imposed solely in the United States itself. For any given level of profits generated in domestic markets, the fine imposed on a global cartel should be higher than the fine imposed on a purely domestic cartel to offset the lower probability of detection and conviction of the international cartel. Allowing suits in the United States to recover based upon international, rather than merely domestic, profits would be a significant step in raising the expected penalty to an international cartel for operating in the United States. In the absence of such a higher fine, deterrence of cartels in U.S. markets would, in general, be less effective against cartels that also operate in other nations.

The fundamental point is that ineffective worldwide antitrust deterrence facilitates the creation of global cartels that operate both abroad and in the United States and that are then difficult to detect and convict, which in turn means that they are more likely to be formed in the first place. Insufficient deterrence against the global harm caused by an international cartel can thus eviscerate efforts to protect U.S. markets from the adverse effects of collusion.

IV. Strengthening Deterrence of Global Cartels Protects U.S. Consumers.

In an ideal world, without transactions costs, every nation would impose a consistent set of sanctions against cartels and

international agreements would ensure full comity among them. The ultimate policy goal should be to pursue this ideal by raising antitrust standards around the world. The United States should seek to have other countries institute antitrust laws that allow for both criminal and civil prosecution, and also seek to have other countries institute treble damage awards. Such an international system would deter global cartels more efficiently than the presently fragmented system.

This ideal world is far from today's reality. International sanctions remain too weak to deter global cartels. For the foreseeable future, alternative mechanisms are therefore necessary. One practical method of improving the protection of U.S. consumers against international conspiracies is to allow foreign parties to sue for private damages in U.S. courts, even when such suits arise from the foreign effects of a global cartel that also operates in the United States. Adopting a more expansive view of the jurisdictional reach of U.S. antitrust laws would raise the total expected penalty, relative to expected profits, from what would obtain if the penalty were based solely on U.S. transactions. The result would be more effective deterrence against global cartels operating in the United States, along with more effective deterrence abroad.

Both economists and the courts have recognized the deterrence value of allowing foreign plaintiffs to sue in domestic courts. For example,

> suppose only country A has an antitrust law. A cartel sells to consumers in countries A and B. In order to deter the cartel from forming, a penalty that deprives the cartel of at least its total profits is required. Yet that can only occur if someone who has standing to sue in country A can collect for the overcharges to consumers in country B.

Carlton, *The Proper Role for Antitrust*, at 3-4. Similarly, the D.C. Court of Appeals wrote that, "[a]llowing suits by those injured solely in foreign commerce, where the anticompetitive

conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct." 315 F.3d at 356. Indeed, the legislative history of the Foreign Trade Antitrust Improvements Act indicates that "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. REP. No. 686, 97th Cong., 2d Sess., at 10 (1982).

The Department of Justice can already base its criminal fee calculation on *global* cartel sales in certain situations. *ICPAC Final Report* at 169 n. 24. Yet the whole structure of antitrust laws in a domestic setting reflects an understanding that criminal fines and penalties, by themselves, are not sufficient to deter cartel activity. The primary motivation for the treble damages provision is precisely to ensure sufficient deterrence of collusion. To ensure a parallel degree of deterrence against global cartels requires that not only criminal, but also civil, fines be based on the cartel's global sales.

Finally, note that the distinction between "domestic" effects and "foreign" effects at best assumes importance only when viewing the antitrust laws from the perspective of recovery to victims; it is not a particularly illuminating distinction when viewing the antitrust laws from the perspective of deterrence, which is the proper way to view them from an economic policy perspective. From a deterrence perspective, the fact that the injuries are suffered by foreign consumers in low-friction global markets is not important, because those injuries are still an effect of the cartel's inclusion of the U.S. market as a means of sustaining its global control. In *Pfizer*, the Court recognized this point, warning against "deny[ing] foreigners a remedy when they are injured by antitrust violations" and observing that "[t]reble-damages suits by foreigners who have been victimized by antitrust violations clearly

may contribute to the protection of American consumers." 434 U.S. at 314.

Amici's conclusion is that allowing private suits in the United States by foreign plaintiffs against global cartels would further the purposes of the U.S. antitrust laws by helping to protect American consumers against the harms of international cartels with a not insignificant anticompetitive effect in the United States. This benefit would accrue to American consumers, furthermore, even when such claims stem from the foreign effect of the global cartel conduct. It would also help to protect consumers abroad against the adverse effects of cartels.

V. COUNTER-ARGUMENTS DO NOT OUTWEIGH THE INCREASED DETERRENCE FROM ALLOWING SUITS ON FOREIGN TRANSACTIONS.

Others, including the Department of Justice, *see, e.g.*, Brief of United States as *Amicus Curiae* at 19-21, appear to have reached a different judgment on the policy merits. In this section, we briefly discuss the various objections.

The principal policy counterarguments against *Amici*'s view is that allowing private suits by foreign plaintiffs could induce excessive deterrence, that it could cause undue administrative burdens, and that it could reduce deterrence (to the extent it reduces the attractiveness of the Justice Department's corporate amnesty program). None of these concerns is sufficient to outweigh the benefits of more aggressive action to combat international cartels:

1. The risk in international markets is clearly under-deterrence, not over-deterrence, of global cartels.

2. Administrative burdens would arise only when a global cartel affected commerce in the United States, and such administrative burdens could be mitigated by appropriate safeguards against

frivolous lawsuits. Furthermore, it is possible that increased deterrence, by preventing the illegal conduct in the first place, would lead to a decline in administrative burdens, rather than an increase.

3. The Justice Department's speculation that incentives for participation in the corporate amnesty program could be so weakened that the overall effect would be *reduced* deterrence against cartels is inconsistent with policy recommendations made by the OECD and others to strengthen private civil penalties against global cartels in other countries. In any case, the effect is ambiguous theoretically, and a dramatic adverse effect seems unlikely. In *Amici*'s view, the net effect of increasing civil penalties on global cartels that operate in the United States would undoubtedly be increased deterrence and better protection of consumer welfare in the United States.

Some observers are concerned that allowing private suits in the United States for the foreign effects of global cartels could lead to excessive deterrence, as firms were held liable in multiple jurisdictions for such foreign effects. In practice, however, the current risk is under-deterrence, not over-deterrence. As noted above, the OECD has exhaustively studied global cartels and concluded that "available data indicate that larger sanctions are required to achieve effective deterrence." OECD, *Hard Core Cartels Policy Brief*, at 3. As one observer has noted:

> [T]he current round of international cartel enforcement suggests that * * * major international corporations are more willing than we might otherwise have thought to engage in anticompetitive behavior. In the vitamins cartel prosecution, for example, the informations indicate that representatives of Roche were engaging in price-fixing discussions on vitamins at the very same time that the company was entering a guilty plea in the citric acid cartel case.

First, 68 ANTITRUST L.J. at 731.

It seems extremely unlikely that allowing private suits in the United States based on the foreign transactions of global cartels with anticompetitive effects in the United States would dramatically shift the balance of risks toward over-deterrence. Indeed, given the difficulty of detecting and convicting global cartels, it is not even clear that allowing such suits in the United States would be sufficient to deter global cartels adequately. But such suits would certainly be a step in the right direction.

As for any potential over-deterrence from duplicative suits or recoveries, existing or additional limits on such duplication would minimize any potential danger. For example, it might be reasonable to limit suits in the United States when foreign transactions had already been adjudicated abroad. Foreign courts also could limit suits that had already been the subject of legal action here. Likewise, damages paid in initial suits could be credited against available damages in subsequent suits either here or abroad, thus ensuring a maximum of treble damages in all jurisdictions for private cases.[3] The possibility of double recoveries is a commonly confronted and resolved issue, and established legal rules, including claim preclusion, exist in all jurisdictions to avoid such double recoveries.

Finally, because the treble damages standard is already applied and accepted for unlawful transactions within the United States without significant concern about over-deterrence, any claimed concern with potential over-deterrence from extending access to U.S. courts to foreign

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[3] The requisite coordination could be facilitated through bodies such as the International Competition Network, an international organization devoted to improving coordination of national antitrust policies.

plaintiffs seems misplaced and inconsistent at best. If rigorous private enforcement and treble damages indeed over-deter certain behavior, then it makes little sense to selectively over-deter domestic transactions rather than to maintain a level playing field between firms with predominately U.S. operations and firms with substantial foreign operations.

A second concern raised by opponents of broad U.S. antitrust jurisdiction is that even if the private suits were helpful in deterring global cartels, they may impose excessive administrative costs on the U.S. legal system. Although administrative burdens may increase, any such increase seems likely to be a small price to pay for the benefits of discouraging the "supreme evil of antitrust: collusion." *Verizon*, -- U.S. at --, 124 S. Ct. at 879. Any potential increase in administrative burdens would be mitigated by the possibility that foreign plaintiffs could simply join suits filed by domestic plaintiffs, as had originally occurred in this case. And administrative burdens would be reduced further by the ordinary application of *forum non conveniens* principles, which would effectively remedy any genuine burden on the U.S. courts. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

Furthermore, it is worth noting that the net effect of allowing private suits in the United States for foreign effects of international conspiracies may ultimately be a reduction, not increase, in the administrative burden on the courts. To be sure, the initial direct effect of allowing such suits may be an increase in administrative burden. But to the extent that the increased deterrent is effective, the number of global cartels would decline and thus the administrative burden may decline. A higher level of deterrence may result in a smaller number of cases. *See* Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 19-21 (Lawrence J. White, ed., 1988) (discussing "Laffer curve of litigation").

The bottom line is that the fear of frivolous lawsuits in the United States should elicit a set of reasonable protections against abuse (such as requiring that the global cartel had imposed a not insignificant anticompetitive effect in the United States, that the market be characterized by relatively low trading frictions, and perhaps by applying a credit for foreign penalties when computing damages based on foreign effects), rather than prohibiting all suits based on foreign effects. As emphasized above, such suits can help to strengthen deterrence against global cartels operating in the United States.

A final economic policy concern has been raised by the Department of Justice, which argues that allowing private suits in the United States for foreign effects would undermine the efficacy of its corporate amnesty program. Under the program, the first corporation in a cartel to cooperate with the antitrust authorities may be provided protection from prosecution. Any individuals who come forward with a corporation that applies for amnesty may also receive immunity.

The Justice Department argument is that the corporate leniency program provides amnesty only from *criminal* prosecution, not civil penalties. The larger civil penalties that could arise if private civil suits were allowed for foreign transactions, according to the argument, would attenuate incentives for conspirators to participate in the corporate leniency program, which would in turn undermine anti-cartel activities. Justice argues that the net effect is weakened deterrence.

Several points are worth underscoring with regard to this argument. First, note that the concern here is that allowing private suits would trigger a *reduction* in deterrence, which is in considerable tension with the supposed concerns regarding over-deterrence.

Second, the Justice Department argument would logically apply to *any* increase in private civil sanctions on global cartels, regardless of whether those sanctions were applied by

U.S. courts or foreign courts. Under the Justice Department's argument, any increase in private civil sanctions imposed on a global cartel should so discourage participation in the corporate amnesty program as to diminish overall deterrence. That conclusion would apply to increasing civil sanctions imposed by foreign courts, which are not waived under our corporate amnesty program, as well as to sanctions imposed by U.S. courts. Yet the OECD has firmly concluded that countries should consider "increasing fines that are imposed against organisations for participating in [a] cartel to a level that approaches three times the gain to the cartel." OECD, HARD CORE CARTELS, at 46. Such a recommendation would be counterproductive if the Justice Department view were correct.[4]

Third, the empirical relevance of the argument depends in large part on why firms participate in the corporate amnesty program. If the dominant concern among firms considering participation in the program is the avoidance of criminal fines and imprisonment of executives, even relatively large increases in civil penalties may have little adverse effect on participation incentives.[5]

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[4] In addition to the direct deterrence effect of raising the penalty (F) in the expected penalty (pF), there can also be interactive effects between (p) and (F) themselves, whereby the increased amount of civil recovery creates greater incentives for private parties to uncover illegal behavior in the first place, thus increasing the probability of discovery and conviction (p) as well.

[5] The view that the threat of criminal penalties is the primary motivation for participation in corporate amnesty programs does not necessarily imply that civil penalties play a small role in deterring collusion in the first place. Firms initially considering whether to engage in collusive activity may approach the decision from a perspective closer to risk-neutral, profit-maximizing behavior, in which expected civil penalties can play a critical role. However, executives fearful of being prosecuted after the cartel has commenced may exhibit more risk aversion, and the threat of criminal prosecution may then weigh particularly heavily in their decision-making. Such differences in risk assessment over time may be especially salient with regard to corporate executives who become aware of or are hired after the conspiracy has already commenced.

Several sources suggest that avoiding criminal prosecution and possible imprisonment is the most important factor in motivating participation in the amnesty programs. For example, the director of criminal enforcement at the Antitrust Division emphasizes that "monetary cost savings may not be the most important consideration when the freedom of individuals is hanging in the balance." Scott D. Hammond, *When Calculating The Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?*, Speech presented at the Fifteenth Ann. Nat'l Inst. on White Collar Crime, ABA Crim. Justice Sect., at 13 (Mar. 8, 2001) (Dir. Crim. Enf., Antitrust Div., DOJ) (available at http://www.usdoj.gov/atr/public/speeches/7647.pdf). The OECD similarly argues that "[t]he opportunity to avoid individual liability or criminal penalty may be a significant factor in encouraging early co-operation." OECD, FIGHTING HARD-CORE CARTELS: HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES 25 (2002).

Foreign firms also face the threat of criminal prosecution, and their incentives to participate in the corporate amnesty program may also be determined primarily by that threat. Since fiscal year 2001, roughly one-third of the individual defendants in Department of Justice cartel cases have been foreign nationals. Foreign defendants from Canada, Germany, Switzerland, Sweden, and France have served prison sentences in U.S. jails for violating U.S. antitrust laws. Antitrust Division, DOJ, *Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program* 3 (Feb. 2004) (available at http://www.usdoj.gov/atr/public/guidelines/202531.pdf).

Given the paramount importance of avoiding criminal prosecution, especially for the executives themselves, any indirect effect from increased civil liability of reducing the in-

centive to seek amnesty seems unlikely to be powerful enough to offset the direct increase in deterrence from allowing private suits for the foreign transactions of a global cartel. Indeed, the logic of the Justice Department's view that any indirect effect of civil penalties through the corporate amnesty program outweighs the direct effect of such penalties in deterring collusion would suggest *reducing* overall civil penalties in purely domestic cases in order to bolster deterrence. The absence of such a proposal is at least suggestive that the Justice Department recognizes the potency of civil treble damages in deterring collusion.

Fourth, even if civil fines were an empirically important factor in determining participation in the corporate amnesty program, the effect may be the *opposite* of what the Justice Department supposes. In particular, assume that whether firms participate in the corporate amnesty program depends on not just the direct gain to the corporation (which may reflect a balancing of criminal penalties avoided and civil costs incurred), but also the costs imposed on its competitors that are members of the cartel. By raising the costs imposed on competitors, allowing private suits for foreign effects may increase the incentive for firms to participate in the amnesty program.[6]

Finally, if the antitrust authorities believe that the failure to waive civil penalties results in substantial diminution of the incentives to participate in the corporate amnesty program, the conclusion should not be to avoid the proper level of civil

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[6] More specifically, assume that each firm in a cartel faces an identical criminal penalty, that they differ in their civil exposures, and that all firms are financially sound enough that the complications arising from joint and several liability are not relevant. Then the firm with the smallest civil liability would generally have the strongest incentive to participate in the amnesty program, in part because of the relatively larger civil costs that would then be imposed on its competitors. If private suits for foreign effects were allowed, this firm may have an even stronger incentive to participate in the amnesty program.

penalties in the aggregate. Instead, the appropriate policy response would involve mechanisms for waiving some or all of the civil penalties for firms that participate in the amnesty program, as has been proposed in the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong., 1st Sess. § 103, 149 CONG. REC. S13520 (2003) (text at http://www.theorator.com/bills108/s1797.html). If civil penalties were waived for participants in the amnesty program, increasing the total civil penalties that would otherwise apply (*e.g.*, by allowing suits for foreign transactions) would *strengthen* incentives to participate in the program. (*Amici* are not necessarily recommending this course of action, but merely pointing out that it represents an alternative, and preferable, policy response if the Justice Department's hypothesis regarding the net effect of strengthened aggregate civil penalties is correct.

Amici's conclusion is that from the perspective of maximizing U.S. economic welfare and furthering the fundamental goals of U.S. antitrust law, none of the policy concerns discussed in this section are sufficient to offset the gains from increasing the aggregate penalties imposed on firms convicted of participating in international cartels.

CONCLUSION

From a public policy perspective, private suits by foreign plaintiffs should be allowed in the United States, even when such claims involve the foreign transactions of global cartel conduct, as long as the international cartel has or is likely to have a not insignificant anticompetitive effect in the United States. Given the interdependent nature of global cartels operating in low-friction international markets, such foreign transactions are as much a consequence of including the United States in the cartel as are domestic transactions. And deterring such foreign transactions is essential to deterring U.S. inclusion in the cartel.

For the foregoing reasons, the decision of the U.S. Court of Appeals for the D.C. Circuit should be affirmed.

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F. HOFFMAN-LaROCHE, LTD, *et al.*,

Petitioners,

v.

EMPAGRAN S.A., *et al.*,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICI CURIAE* COMMITTEE TO SUPPORT THE ANTITRUST LAWS AND NATIONAL ASSOCIATION OF SECURITIES AND CONSUMER ATTORNEYS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Government's Leniency Program Will Not Be Adversely Affected By An Affirmance Of The Decision Below	4
II. The Nation's Foreign Relations Will Not Be Affected By An Affirmance In This Case	11
III. The Government's Narrow Interpretation Of The Act Is Inconsistent With Its Long-Standing Approach To Extraterritorial Application Of The Sherman Act	17
CONCLUSION	25

TABLE OF AUTHORITIES

Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Committee to Support the Antitrust Laws ("COSAL") and the National Association of Securities and Consumer Attorneys ("NASCAT").[1] COSAL is a nonprofit corporation organized and existing under the laws of the District of Columbia. COSAL is a membership organization founded in 1986. Its members are individuals and organizations, primarily law firms, that are interested in furthering the goals of the antitrust laws. Its members come from across the United States.

One of the purposes of COSAL, as set forth in its Articles of Incorporation, is "to promote and support . . . the enactment, preservation and enforcement of a strong body of antitrust laws of the United States and its political subdivisions." COSAL members have been involved in numerous litigations involving international cartels.

NASCAT is a nonprofit membership organization founded in 1989. The member law firms represent investors and consumers in white-collar crime, fraud and securities cases. NASCAT also fights for investor rights in areas including the securities laws and corporate governance. It has worked to preserve the civil racketeering laws and to lengthen the statute of limitations for securities suits (in the Sarbanes-Oxley law).

A determination that anticompetitive practices occurring outside the territorial boundaries of the United States

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no person other than counsel or *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

cannot give rise to claims in the courts of the United States would have significance to COSAL's and NASCAT's members and their clients.

SUMMARY OF ARGUMENT

The Department of Justice offers a series of policy arguments in favor of petitioners' interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (the "Act"). Nothing in the plain language, structure, or legislative history of the Act suggests that any of these policy considerations were known to, let alone influenced, members of Congress at the time the Act was passed. Even if these post-enactment concerns were somehow relevant, they are unpersuasive and contradicted by the government's experiences and practices.

1. The government argues that the Act should be given a narrow interpretation so that the vitality of the leniency program for self-reporting violators is not jeopardized. The government's concerns are misplaced, however, because the key incentives that have made the program a success – immunity from criminal prosecution and sanctions – remain unaltered by the decision below. And the added civil liability that cartel members face becomes a consideration only if they are confident their action will go undetected if they do not confess, a perilous and unsubstantiated assumption. Thus, it is hardly surprising that even in the face of rulings that endorse respondents' broader interpretation of the Act, the government has enjoyed great success in increasing participation in the leniency program.

2. The government also hypothesizes that the Nation's foreign relations will be undermined by respondents' interpretation of the Act. The government posits that a blanket prohibition on the extraterritorial exercise of jurisdiction is necessary to protect the interests of the United States, but it offers no explanation as to why the traditional principles of comity are inadequate to protect our national interests. Both the courts and the Justice Department have relied upon the doctrine of comity to ensure an appropriate respect for the interests of foreign sovereigns. This case-by-case approach is narrowly tailored to the concerns expressed by the government. The government points to no indication that Congress intended to jettison this well-established approach to accommodating the interests of foreign governments.

3. The government's interpretation of the Act would also have the effect of limiting its own enforcement authority. Both the plain language and the legislative history of the Act make clear that the jurisdictional scope of the government's criminal enforcement authority and private civil enforcement authority is coextensive. Thus, if respondents are unable to bring suit in connection with the foreign transactions at issue here, then so too the government cannot seek criminal penalties in connection with such conduct. In the past, the government has imposed both enhanced sentences and higher criminal fines after taking into account just such transactions. A cramped reading of the Act would divest the government of the authority to continue these enforcement practices.

ARGUMENT

I. The Government's Leniency Program Will Not Be Adversely Affected By An Affirmance Of The Decision Below.

The government hypothesizes that the decision below will "deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government." Brief of the United States ("U.S. Br.") at 7-8. As an interpretive matter, the government's policy argument is quite misplaced given that the leniency program was rarely utilized in 1982 when the Act was passed. Tellingly, the Government offers no indication that any member of Congress considered the Act's implications for the leniency program at the time of the Act's adoption. For this reason alone, the government's policy considerations should be disregarded. To the extent the subsequent adoption of new initiatives necessitates changes to the Act, the government should seek relief from the Congress, not this Court. The government is doing just that in a closely related context. *See* R. Hewitt Pate, Assistant A.G., Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before the Antitrust Section of the American Bar Association Annual Meeting 5 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/20124.htm (endorsing legislative proposal to eliminate treble damages for participants in the leniency program).

In addition to being irrelevant, the government's argument is deeply flawed. As the government itself recognizes, "the *primary deterrent* to cartel activity is the threat of *imprisonment and other criminal penalties* (especially when heightened through the fear of exposure created by the amnesty program)." U.S. Br. at 32 (emphases added). It follows that the principal incentive to participate in the

leniency program is the desire to avoid incarceration. Indeed, the specter of imprisonment has been heightened in recent years by the string of high-profile antitrust convictions resulting in jail time for executives. In 1999 and 2000 alone, 46 individuals were sentenced to prison time for antitrust violations. *See A Primer On U.S. Criminal Antitrust*, www.antitrustinstitute.org/primer.cfm. Many of these prison sentences were headline news.[2] The recent publicity and frequency of these sentences reinforce the pressure built into this regime: as the threat of criminal prosecution increases, so also does the pressure on each of the conspirators to be the first to confess to the authorities.

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[2] *See, e.g.*, David Usborne, *Former Heads of Top Auction Houses Charge With Price-Fixing*, THE INDEPENDENT (LONDON), May 3, 2001, at 5 (Taubmann and Tennant indicted on May 2, 2001); Carol Vogel, *Ex-Chairman At Sotheby's Is Considering Sale of Stake*, N.Y. TIMES, June 4, 2002, at C8 (former chairman of Sotheby's considering selling his stake after having been sentenced to one year and a day for price-fixing); *The Media Business: Advertising – Addenda; Ex-Grey Executive Pleads Guilty to Charges*, N.Y. TIMES, Apr. 9, 2003, at C7 (former executive of Grey Worldwide pleaded guilty to antitrust, mail fraud, bid-rigging and tax-evasion charges and faces 63 to 78 months in prison under a plea agreement; former chief executive of Color Wheel sentenced previous month to 37 months in prison after pleading guilty to antitrust, tax, and fraud charges); AP, *A Summary of Illinois News*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, June 27, 2000 (federal appeals court ordered more prison time for two former Archer Daniels Midland Co. executives, saying $100 million antitrust conspiracy deserved more than two-year sentences); *Executive Sentenced in Price-Fixing Conspiracy*, USIS Washington File, Sept. 24, 1999, *available at* http://usembassy-australia.state.gov/hyper/WF990924/epf512.htm (former executive with UCAR International Inc., the world's largest producer of graphite electrodes, sentenced to nine-month prison term); Robert D. Paul, *International Cartels in Crosshairs*, NEW YORK LAW JOURNAL, Sept. 11, 2000 (listing prison terms ranging from three to five months for multiple former executives of Hoffman-LaRoche and BASF).

Significantly, the resolution of the issues before the Court will not in any way change this dynamic.

Confronted with the very real possibility of jail time, financial considerations quite naturally take a back seat, as the growing success of the leniency program reflects. Nevertheless, the government frets that the decision below will "provide a significant disincentive" to those who would otherwise seek leniency from the government. U.S. Br. at 27-28. The government elides the relevant financial incentives for conspirators. Under the leniency program, the first conspirator to step forward pays "*zero* dollars in criminal fines." James M. Griffin, Deputy Assistant A.G., The Modern Leniency Program After Ten Years – "A Summary Overview of the Antitrust Division's Criminal Enforcement Program", Presentation Before the American Bar Association Section of Antitrust Law Annual Meeting 8 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201477.htm (emphasis added). In this case, for example, Hoffman-La Roche alone avoided between $800 million and $2.1 *billion* in fines by seeking leniency. Gary R. Spratling, Characteristics of the International Cartel Enforcement Environment: The United States – 2002, Presentation Before the American Bar Association's 16th Annual National Institute on White Collar Crime 2002 10 (Feb. 28, 2002). *See also A Primer On U.S. Criminal Antitrust*, www.antitrustinstitute.org/primer.cfm (documenting numerous significant fines).

Further, the leniency applicant *does* receive relief from certain liability that offsets the increased risk of private treble-damage actions. The Sherman Act authorizes the imposition of an order requiring restitution to victims. As this case illustrates, however, the government is fully prepared to waive that requirement in recognition

of "the pendency of civil causes of actions which potentially provide for a recovery of a multiple of actual damages." Plea Agreement at 6, *United States v. F. Hoffman-La Roche, Ltd.* (N.D. Tex. May 20, 1999) (No. 99-CR-184-R).

Even the rare conspirator concerned more about corporate financial exposure than his personal freedom will not be deterred from seeking leniency by the prospect of civil damages. As noted, the criminal fines alone can amount to billions of dollars for each conspirator, and so the financial cost of inaction can be seismic. More fundamentally, the government's concern about the continued allure of the leniency program rests on the concern that cartel members can evade detection through inaction. This Do Nothing strategy is viable only if each participant can trust his fellow conspirators not to turn state's evidence. But there is no honor among thieves, a fact of life that thieves well understand. As previously explained by one of the officials responsible for developing the leniency program, the argument now advanced by the government

> makes sense only if you assume that the company can avoid prosecution and the parade of financial horribles if *it* chooses not to come forward. However, for the reasons described above, that outcome is almost always going to be out of the company's control. A company that elects not to come forward and puts itself and its best interests at the mercy of its competitors (and all of their current and former executives with knowledge of the conspiracy) is taking a grave risk. In most cases, by the time the inside or outside counsel learns of the offense, it is already too late to contain the leakage of information to the government. The boat is already

> sinking, and the only question is whether you are going to grab the life preserver.

Scott D. Hammond, Dir. of Criminal Enforcement, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, Address at the Fifteenth Annual National Institute on White Collar Crime 8 (Mar. 8, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/7647.htm.[3]

Indeed, the government has disparaged *precisely* the argument it now advances. Specifically, the Division's Director of Criminal Enforcement has rejected the notion that the "financial benefits of the Amnesty Program . . . are more than outweighed by the company's exposure to treble damage actions by the victims." Hammond, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, *supra*, at 8. As explained by one of the architects of the current leniency program:

> Decisions like *Empagran* certainly complicate the analysis but the analysis on whether or not to go forward and cooperate [with] the government is essentially the same. The analysis is: if [I] get caught, without having self-reported, I am going to be second, third, or fourth in and then have the same exposure to civil damage consequences as I would if I had self-reported, but will

[3] Moreover, those cartelists who do study the legal landscape recognize that such cases have consistently been resolved by settlements in the range of single-damage awards, rather than treble damages. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

> also face criminal fines and the risk of my executives in jail? So *Empagran* just attaches a higher dollar figure to one part of the equation.

Gary R. Spratling, *Cartel Roundtable, The Architects of Enforcement*, 6 GLOBAL COMPETITION REV. 20, 25 (Oct. 2003).[4]

The validity of the government's previous position is borne out by its recent experience in administering the leniency program. The government has seen "a ten-fold increase in U.S. leniency applications" under its current program. Scott D. Hammond, Dir. of Criminal Enforcement, Beating Cartels at Their Own Game – Sharing Information in the Fight Against Cartels, Address Before the Inaugural Symposium on Competition Policy 14 (Nov. 20, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201614.htm. The "rate of amnesty applications is at an all time high – in the first six months of this fiscal year, we have averaged three applications per month." R. Hewitt Pate, Acting Assistant A.G., Anti-Cartel Enforcement: The Core Antitrust Mission, Address Before the British Institute of International and Comparative Law Third Annual Conference on International and Comparative Competition Law 3 (May 16, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201199.htm. "As a

[4] Nor, in any event, is it correct that the amnesty program is the *sine qua non* of discovering cartels and thus imposing civil liability. In a number of cases, including this one, private parties developed evidence of the cartel prior to, and independent of, the government's investigation. Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763, 770 n.38 (2003) (citing Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST 711, 712-13 (2001)).

result of this increased interest, the Division frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty." Griffin, The Modern Leniency Program After Ten Years, *supra*, at 8. This despite the fact that warning signs of potential liability arose years earlier when civil plaintiffs commenced suits like *Empagran* seeking treble damages for cartel sales in foreign markets. And in March 2002, the Second Circuit in the Christie's case held that such claims in private actions are actionable. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2002), *cert. dismissed*, 124 S. Ct. 27 (2003); *Court Decisions*, NEW YORK LAW JOURNAL, Mar. 19, 2002. Yet the prospect that a defendant would be held liable in private actions for all of its unlawful conduct, including its purely foreign sales, apparently did not deter applications to the leniency program.

Finally, even accepting the government's policy arguments at face value, its proposed reading of the Act would spread immunity for civil damages far too widely. Under the government's interpretation, *all* members of a global conspiracy, not just the *one* that steps forward to disclose the existence of the cartel, are immune from *any* civil liability for their purely foreign anticompetitive sales. The government offers no justification for this result. In contrast to its litigation position, the Administration's current legislative initiative would provide reduced civil liability only to those defendants that actually participate in the leniency program. This type of tailored approach is far more appropriate to the policy concerns voiced by the government than the sweeping immunity sought by petitioners.

II. The Nation's Foreign Relations Will Not Be Affected By An Affirmance In This Case.

The government expresses misgivings that "the court of appeals['] holding would also present a risk of undermining the foreign relations of the United States." U.S. Br. at 28-29. The traditional approach to addressing potential foreign relations difficulties raised by extraterritorial application of American laws has been to employ principles of comity. The government has long recognized that

> [the] notion that American and foreign interests have to be weighed against one another in deciding whether to apply the antitrust laws to "extraterritorial" conduct has been followed by a number of other U.S. courts. It has been variously characterized as being based on principles of comity and principles of conflicts of laws, but in any event it is now an accepted part of the American antitrust jurisprudence. It has also been for some time, and continues to be, part of the Justice Department's enforcement policy.

Charles S. Stark, Chief, Foreign Commerce Section, Antitrust and Transnational Conduct – Principle and Practicality, Remarks Before the Annual Conference of the Canadian Council of International Law 4 (Oct. 21, 1983). *See also* 1995 Department of Justice Antitrust Enforcement Guidelines for International Operations ("1995 Department of Justice Guidelines") 110 ("In enforcing the antitrust laws, the Agencies consider international comity. . . . Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected."). The government has also acknowledged that in cases between private parties, courts routinely

undertake a comity analysis. *See* 1995 Department of Justice Guidelines 111.

The doctrine of comity allows courts to make a nuanced, case-specific determination as to the relative interests of the United States and interested foreign sovereigns. Under the *Timberlane* factors, endorsed by the Solicitor General in his amicus brief in *Hartford Fire Insurance Co. v. State of California*, No. 93-2004 (filed Dec. 1992), at 25, courts must weigh

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 614 (9th Cir. 1976). The government's interpretation of the Act would foreclose such a determination. Courts would simply be divested of jurisdiction, no matter how compelling the American interests were. The government offers no justification whatsoever for the abandonment of the traditional method of accommodating foreign relations.

Outside the confines of this case, the government seems quite content to rely upon a case-by-case determination of our Nation's interests. Indeed, the United States has codified this approach in a series of bilateral agreements on

competition law. Included in these agreements are provisions concerning notification of charges or complaints, as well as factors to consider in attempting to avoid conflicts between enforcing authorities. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1995, U.S.-Can., 2028 U.N.T.S. 135, art. II (Notification), art. VI (Avoidance of Conflicts). In Article VI of their Agreement, the United States and Canada set forth nine different factors each must consider in any situation where it "appears that one Party's enforcement activities may adversely affect the important interests of the other Party." *Id.* at art. VI, § 5. This approach has been replicated in a series of similar bilateral agreements.[5] In

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[5] *See also* Agreement Between The Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1999, U.S.-E.C., 30 I.L.M. 1487, art. II (Notification), art. V (Cooperation Regarding Anticompetitive Activities in the Territory of One Party That Adversely Affect the Interests of the Other Party), art. VI (Avoidance of Conflicts Over Enforcement Activities); Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, July 11, 2000, U.S.-Mex., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,509, art. II (Notification), art. VI (Avoidance of Conflicts); Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,507, art. II (Notification), art. IV (factors in avoidance of conflicts); Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, U.S.-Aus., art. II, § C (Notification); Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business

(Continued on following page)

fact, the United States and Israel, as well as agreeing on notification and avoidance of conflict, explicitly codified the notion of comity in their bilateral agreement. Agreement Regarding the Application of Their Competition Laws, Mar. 15, 1999, U.S.-Isr., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,506, art. II (Notification), art. V (Positive Comity), art. VI (Avoidance of Conflicts). *See also* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-E.C., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504a, art. III (Positive Comity).

This case-by-case approach makes perfect sense in light of the substantial gaps in the antitrust enforcement efforts of foreign sovereigns. Petitioners make much of the fact that some foreign nations have adopted their own antitrust regimes. But, at the time of the Act's passage in 1982, the vast majority of such laws did not exist, and thus it is self-evident that Congress did not rely upon the efficacy of foreign enforcement regimes in defining the reach of the Sherman Act. Until recently, "few countries

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Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, art. IV (Requiring notification and appropriate consultation and coordination in the event application of the antitrust laws likely to affect important interests of the other party); Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of their Competition Laws, Oct. 26, 1999, U.S.-Braz., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,508, art. II (Notification), art. IV (Cooperation Regarding Anticompetitive Practices in the Territory of One Party That May Adversely Affect the Interests of the Other Party).

had antitrust laws and fewer still enforced them." Charles A. James, Assistant A.G., International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition 2 (Oct. 17, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9330.htm. For that matter,

> a not infrequent reaction of foreign governments to news that the Antitrust Division was investigating the activities of international cartels was to leap to the defense of "their" firms, accuse the U.S. of "extraterritorial" tendencies in defending our consumers, threaten to invoke blocking statutes, and express astonishment that any country should even want to have antitrust laws, much less enforce them.

Joel I. Klein, Assistant A.G., Address at the International Anti-Cartel Enforcement Conference 7-8 (Sept. 30, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/3727.htm. In any event, "even among countries with reasonably sound and longstanding antitrust laws, we too often see them, even today, failing to provide the resources or political support to its competition authorities to enable them to enforce their law in an effective manner." Joel I. Klein, Principal Deputy Assistant A.G., International Antitrust: A Justice Department Perspective, Address Before the Fordham Corporate Law Institute, at *5 (Oct. 26, 1995), *available at* http://www.usdoj.gov/atr/public/speeches/forhamjik.txt.

Not surprisingly, foreign sovereigns are often solicitous of the economic interests of resident corporations accused of membership in international cartels. Because of

this reality, many foreign enforcement agencies are "*powerless* to curb [cartels]. Indeed, the jurisdiction of domestic competition authorities is usually limited to practices which affect competition in their own country." Frédéric Jenny, Vice Chairman, Conseil de la concurrence; Chairman, OECD Competition Law and Policy Committee; Chairman, WTO Working Group on Trade and Competition Policy, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *in* 5 COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM: PERSPECTIVES FROM THE EU, JAPAN AND THE USA 295, 306 (Clifford A. Jones & Mitsuo Matsushita eds., 2002) (emphasis added).[6] In light of this reality, a major enforcement "gap" would result if this country were to "withhold enforcement against the foreign actors implementing or operating in the shadow of home policy." Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916-17 (2003). If we "exercise restraint out of respect for

[6] Trade officials in cartel members' home governments frequently foster their activities. The reality in some countries is that "[c]ompetition officials are kept on short leashes. . . . This means that with the support of their political leaders – who, alas, are frequently wary of antitrusters – trade officials promote the most economically damaging cartel behavior of all: market allocation agreements involving many agricultural products, heavy industrial products, textiles, and, increasingly, electronic products." Douglas E. Rosenthal, *Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: We Need More "Old-Time Religion": A Response To Jim Rahl*, 10 NW. J. INT'L L. & BUS. 84, 87 (1989). *See also* Kurt Stockmann, *Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: The Janus-Face of Competition Policies*, 10 NW. J. INT'L L. & BUS. 31, 31 (1989) (Although many nations will protect domestic companies from each other, their international competition policies "encourage, authorize, and even compel restraints of trade.").

restraining nations' sovereignty . . . the gap may be great, as in the case of . . . commodity cartels." *Id.* at 923.

This very case illustrates such an enforcement gap. Although petitioners trumpet the legal actions pending in several foreign jurisdictions, Petitioners Brief at 4, they neglect to mention that they face no enforcement actions in the vast majority of countries in which they charged monopolistic prices. Cartelists well understand this enforcement gap. They exploit it by operating in "countries which [do] not have a competition policy and . . . they engage[] systematically in predatory pricing or dumping whenever a developing country [is] building up a domestic industry." Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *supra*, at 315.[7]

III. The Government's Narrow Interpretation Of The Act Is Inconsistent With Its Long-Standing Approach To Extraterritorial Application Of The Sherman Act.

The government predicts that the court of appeals' interpretation of the Act will undermine its ability to enforce the antitrust laws. U.S. Br. at 1. Just the opposite

[7] Foreign antitrust laws also very rarely provide for civil damage awards, which Congress has correctly determined to be an essential element of deterrence. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Comm. on the Judiciary*, 99th Cong. 17 (1985) (statement of Charles F. Rule, Acting Assistant A.G.) ("It must be recognized, however, that foreign courts may be unavailable for, or unhospitable to, private causes of action of the kind represented by U.S. antitrust litigation.").

is true. As respondents demonstrate, the jurisdictional scope of the government's criminal enforcement authority and private parties' civil enforcement authority is coextensive. The plain language of the Act defines the jurisdictional boundaries of the Sherman Act without drawing any distinction between civil and criminal enforcement actions. As the House Report recognized, the Act's definition of subject matter jurisdiction applies equally "against Sherman Act suits by the Department of Justice and private parties." H.R. REP. 97-686, at 8 (1982). Thus, it is clear that if private parties are not able to bring suit for injuries resulting from foreign sales of a global cartel impacting the United States, then neither will the government.

Such a limitation on the government's criminal enforcement authority would preclude its repeated practice of imposing criminal penalties on antitrust violators on the basis of their worldwide sales. In case after case, the government has invoked purely foreign sales in assessing the culpability of those who violate the Sherman Act. Just three Terms ago, the Solicitor General recognized as much:

> [C]onsistent with the Fifth Circuit's decision, a court may consider the *foreign commerce* affected by the illegal conduct when the amount of affected domestic commerce understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on United States consumers. In that circumstance, the court may take into account the defendant's *worldwide sales affected by the conspiracy in making an upward departure in a defendant's sentence*. . . .

Brief of the United States at 9-10, *Statoil ASA v. HeereMAC V.O.F.* (U.S. filed Jan. 2002) (No. 00-1842) (emphasis added).[8] *See also* Gary R. Spratling, Deputy Assistant Attorney General, "Negotiating the Waters of International Cartel Prosecutions," Address at the 13th Annual National Institute on White Collar Crime 18 (Mar. 4, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2275.htm ("[W]hen the amount of U.S. commerce affected by a defendant in an international cartel understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on American businesses and consumers, *the Division will consider the defendant's worldwide (U.S. and foreign) sales* in the Sentencing Guidelines calculation." (emphasis added).

In its *Statoil* brief, the government pointed to two plea agreements in which this approach had been adopted. *See* Brief of the United States in *Statoil* at 10. For example, in *United States v. Roquette Freres,* No. CR 97-00356 (N.D. Cal. 1997), the government negotiated a fine on the basis of foreign sales because the defendant's United States market share was relatively small compared to its share of the worldwide market. Brief of the United States in *Statoil* at 10. Based on defendant's volume of American commerce, the guidelines fine would have been $748,000 to $1,282,000. The court imposed the agreed-upon fine of $2.5 million. *Id.* at 10 n.5. Likewise, the government has repeatedly submitted sentencing memoranda predicated on the view that criminal fines under the Sherman Act should reflect

[8] This passage demonstrates that the government mistakenly assumes that its criminal enforcement authority will not be affected by the resolution of this case.

foreign sales of a worldwide cartel. *See, e.g.*, Sentencing Memorandum at 3-4, *United States v. Merck KgAA* (N.D. Tex. filed May 5, 2000) (No. 300-CR-189-R) (assessing defendant's culpability by reference to its sales "in the United States *and elsewhere*") (emphasis added); Transcript of Plea of Guilty and Sentencing at 7-8, *United States v. Lonza, AG* (N.D. Tex. filed Dec. 3, 1999) (No. 3:99-CR-338-R) (same); Sentencing Memorandum, *United States v. Degussa-Huls AG* (N.D. Tex. filed May 5, 2000) (No. 300-CR-187-R) (same); *Sentencing Memorandum* at 3-4, *United States v. Eisai Co.* (N.D. Tex. filed Sept. 9 1999) (No. 3:99-CR-335-R) (same); *Sentencing Memorandum* at 3-4, *United States v. Daiichi Pharmaceutical* (N.D. Tex. filed Sept. 9, 1999) (No. 3:99-CR-334-R) (same).

Similarly, the Solicitor General's brief in *The Timken Roller Bearing Company v. United States*, No. 352, at 83, stated:

> The foreign cartel arrangements were held by the district court to be illegal not only as direct restraints upon United States foreign commerce, but also as part of the over-all conspiracy to eliminate competition. The arrangements were links in the conspiratorial chain designed to suppress competition on a world-wide basis and *would have violated the Sherman Act even if they had related solely to the commerce of foreign nations.*

(Emphasis added and internal citations omitted).

In short, the government's own course of conduct confirms the propriety of enforcing the Sherman Act to reach foreign sales such as those at issue here. This approach makes perfect sense given that the success of cartels aimed at the United States depends upon foreign

restraints, as respondents have demonstrated in their brief.

In the instant case, the government reaches a contrary conclusion only by focusing myopically on the specific transactions at issue rather than on the conduct of the cartel members as a whole. *See, e.g.*, U.S. Br. at 10 (objecting to application of the Sherman Act to "injuries that [respondents] sustained entirely overseas and that arose out of purely foreign sales transactions that had no substantial effect on United States commerce"). This fixation on the specific sales at issue is flatly inconsistent with the government's emphasis on assessing the *conduct* of the conspirators as a whole. The government's brief in *Statoil* recognized that "[w]hen an international cartel's *conduct as a whole* has [a direct, substantial and reasonably foreseeable] effect, 'such effect gives rise' to the United States' 'claim' under the Act." Brief of the United States in *Statoil* at 8 (emphasis added). Likewise, the government's own guidelines identify the "conduct" of conspirators, not specific transactions, as the appropriate analytical focus in assessing United States jurisdiction:

> The Agencies would have to determine whether the challenged *conduct* had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. Furthermore, since "the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself – rather than the overt act performed in furtherance of it," the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce.

1995 Department of Justice Guidelines 107 (alteration in original) (emphasis added). Focusing on the conduct of conspirators such as petitioners is crucial to vindicating the broader purposes of the Sherman Act. In the absence of price fixing in foreign markets, exports from those countries would quickly ensure the demise of the cartel in the United States.

Finally, quite apart from restricting its criminal enforcement authority, the government's interpretation of the Act will reduce the deterrent effect of the Nation's antitrust laws, which depend upon the combination of strong public *and* private antitrust enforcement. Congress has long recognized that the government acting alone is not enough to fulfill the goals of the Sherman Act. *See, e.g., Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (same).

This case illustrates the critically important role that private enforcement plays in detecting and putting an end to price-fixing cartels. "Class Plaintiffs uncovered the alleged conduct among bulk vitamins producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing." Order at 5, *In re Vitamins Antitrust Litig.*, Misc. No. 99-197 (Feb. 18, 2004). In fact, private civil litigants began pursuing the vitamins case in the spring of 1997, six months before the government's grand jury was disclosed. Private antitrust suits predated the first indictments in the case by almost a

year, and the principal indictments by more than a year and a half. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust 711, 713-14 (2001). Hoffman-La Roche itself acknowledges that it was not until the private enforcement suits were launched that its internal investigations were able to uncover the conspiracy.[9]

Even the combined efforts of public and private enforcement are unlikely to produce any "overdeterrence." Economists have concluded that the "optimal fine" for deterrence purposes is "187% of the commerce affected by the cartel," but that "actual fines imposed were found to be less than 1% of the level necessary to deter cartel conduct. While fines have increased significantly since these studies were conducted – both in dollar amounts and as a percentage of affected commerce – they are not now and

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[9] At a May 21, 1999 press conference announcing the guilty pleas, Hoffman-La Roche's CEO, Franz Humer, explained:

> In 1997, responding to the settlement in the citric acid case and to the news of an investigation of the bulk vitamins industry, Roche initiated an internal inquiry of its own, which at the time did not turn any evidence of wrongdoing. A second internal inquiry prompted by class action lawsuits filed against Roche and other companies in early 1998 for alleged price-fixing in the bulk vitamins market revealed that further action was needed. The inquiry was carried out in collaboration with US experts. Internal measures were implemented without delay to ensure an immediate halt to any antitrust violations. The findings from this second inquiry formed the basis for Roche's decision to offer, on 1 March this year, its full cooperation in the US Justice Department investigation.

Available at http://www.roche.com/med-corp-detail-1999?id=201&medialanguage=e.

never will be *anywhere near* the optimal fine level established by those studies." James M. Griffin, Deputy Assistant A.G., Key Challenges in Public Enforcement Against International Cartels, Address Before the British Institute of International & Comparative Law Second Annual Conference on International and Comparative Competition Law: Trends and Tensions 6-7 (May 2002) (emphasis added).

It is therefore essential to make would-be cartelists appreciate not merely the prospect of "criminal fines," but also "the other costs and consequences of the cartel case – U.S. treble damage actions, non-U.S. enforcement actions and civil actions, and corporate governance and shareholder actions," which in combination have "a much greater impact on the deterrence analysis." Donald C. Klawiter, *Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, 69 GEO. WASH. L. REV. 745, 762-63 (2001).

This case demonstrates that the sanctions of criminal enforcement alone are not enough to deter cartel activity. The lead petitioner continued its central role in the vitamins cartel despite having been *criminally prosecuted* for participating in another cartel. After pleading guilty to participating in the citric acid cartel, "Hoffmann-La Roche officials continued to meet regularly and collude on vitamin sales and lied to government investigators about the existence of the vitamin cartel," engaging in a "brazen disregard for the antitrust laws." Belinda A. Barnett, Sr. Counsel to Assistant A.G., Antitrust in the Twenty-First

Century – "Status Report on International Cartel Enforcement", Address Before the State Bar of Georgia Antitrust Law Section 4 (Nov. 30, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/7086.htm. "Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel." Scott D. Hammond, Dir. of Criminal Enforcement, Lessons Common to Detecting and Deterring Cartel Activity, Address at the 3rd Nordic Policy Competition 6 (Sept. 12, 2000).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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F. HOFFMAN-LA ROCHE LTD., *et al.*,
Petitioners,

v.

EMPAGRAN, S.A., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 1

Argument 3

I. U.S. Courts Have Jurisdiction Over Plaintiffs' Suit Under Section 1 of the Sherman Act 3

II. The FTAIA Does Not Cut Back Jurisdiction Over This Case 5

III. U.S. Courts Should Not Be Closed to Plaintiffs Injured In Their Business or Property by an International Cartel with Substantial U.S. Effects Only Because Plaintiffs' Purchases Are Made Outside the United States 11

Conclusion 16

TABLE OF AUTHORITIES

Cases: **Page:**

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 14
Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001) 11
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 1, 5, 6-7
In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D. Md. 2001) 11
Industria Siciliana Asfalti Bitumi, S..A. v. Exxon Research and Engineering Co., 1977-1 Trade Cas. (CCH) ¶ 66,256, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977) 6
Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) 12
Pfizer Inc. v. Government of India, 434 U.S. 308 (1978) 12
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Legislative Materials: **Page:**

15 U.S.C. § 6a 5-6, 8-9
15 U.S.C. § 16(a) 4

Legislative Materials (cont'd): **Page:**

15 U.S.C. § 45(a)(3) 9
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BRIEF AMICI CURIAE OF LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Professor Harry First and Professor Eleanor M. Fox respectfully submit this brief amici curiae in support of respondents.[1] Professors First and Fox are professors of law at New York University School of Law.[2] Both teach and write in the area of antitrust law, including international antitrust enforcement.

SUMMARY OF ARGUMENT

U.S. courts have jurisdiction over plaintiffs' claims under Section 1 of the Sherman Act. Jurisdiction exists because defendants' sales to plaintiffs outside the United States were made in international markets pursuant to a price fixing and market allocation agreement which had "substantial effect" on "trade or commerce . . . with foreign nations." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). Recognizing such jurisdiction is consistent with the recent attention to the prosecution of international cartels by the United States.

The Foreign Trade Antitrust Improvements Act of 1982 did not cut back Sherman Act jurisdiction over this case. The FTAIA, by its terms, does not apply to conduct involving "import trade or import commerce." The vitamins cartel involved precisely such conduct, an inextricable aspect of the conspirators' efforts to restrain trade in international markets for

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[1] Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part. No persons other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been submitted to the Clerk.

[2] Professor First, while Chief of the Antitrust Bureau of the New York State Attorney General's Office, represented New York and its consumers in the settlement of their antitrust claims against several of the petitioner vitamins manufacturers.

various vitamins and vitamin products. Even if the FTAIA did apply, the Act concerns only what conduct the Sherman Act reprehends, not who can sue under the Sherman Act.

U.S. courts should not be closed to plaintiffs injured by international cartels, operating in international markets, with direct effects on U.S. commerce, only because the plaintiffs' purchases took place outside the United States. Such a rule would be inconsistent with the United States' enforcement efforts in the area of international antitrust enforcement, would be unduly formalistic, would ignore the economic effects of international cartels, diminish the deterrent effect of U.S. antitrust law, and undercut the compensatory function of the private action.

ARGUMENT

I. U.S. COURTS HAVE JURISDICTION OVER PLAINTIFFS' SUIT UNDER SECTION 1 OF THE SHERMAN ACT.

This case is the inevitable outgrowth of the internationalization of markets in the late 20th century. This internationalization has attracted interest from prosecutors intent on rooting out and deterring international price-fixing cartels and from private plaintiffs seeking to recover the monetary damages these cartels have inflicted.

Cartels involving foreign trade have received Sherman Act attention from government and private enforcers from the earliest days of the Sherman Act. *See United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (international tobacco cartel); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (private action against anticompetitive behavior by members of international shipping conference).

Although historically international cartels have been the object of intense prosecutorial attention by the Justice Department, *see* Harry First, Structural Antitrust Rules and International Competition: The Case of Distressed Industries, 62 N.Y.U.L. Rev. 1054, 1076, 1077 (1987) ("Between 1939 and 1945, the Department of Justice initiated fifty-two proceedings against international cartels, involving 105 products and 165 firms."), as an international economy continued to develop during the late 1980s and early 1990s, prosecutors renewed their interest in the operation of cartels that affect international markets. The result has been an extraordinary increase in cartel prosecutions. Between 1990 and 1999, the Antitrust Division filed more than 23 international cartel prosecutions, charging more than 80 corporate and 60 individual defendants in the process. *See* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report 167 & Annex 4-A (2000). By

1997, 32 percent of corporate defendants and the same number of individual defendants were foreign-based. *Id.* at 167 n.16. Between 1997 and 1999, international cartel prosecutions accounted for more than 90 percent of the fines imposed in criminal antitrust cases annually. *Id.* at 169.

It is not surprising that the increase in government international cartel prosecutions has drawn the attention of plaintiffs victimized by the cartels; this is how our antitrust enforcement system is intended to work. *See* Clayton Act, § 5(a), 15 U.S.C. § 16(a) (prima facie effect of final judgments in government criminal proceedings). Nor is it surprising that some of these plaintiffs, like the plaintiffs in this case, purchased the price-fixed goods outside the United States. Vitamins, like so many goods today, are manufactured and sold "[i]n a world in which economic transactions observe no boundaries." United States Department of Justice and Federal Trade Comm'n, Antitrust Enforcement Guidelines For International Operations § 3.1 at n.51 (1995). Nor is it surprising that there appear to be no similar reported cases arising out of earlier cartel prosecutions. Markets in earlier eras were less interconnected and private antitrust actions less frequent. Further, the effects doctrine, which supports jurisdiction over this cartel's conduct outside the United States, was a contested one for many years, particularly during the 1970s. As the U.S. government began to uncover and prosecute international cartels, however, our trading partners came to realize the extent to which they, too, were victimized by cartel behavior beyond their borders. The result is that criticism of the effects doctrine has faded around the world, and particularly in Europe. *See* International Guidelines, *supra*, § 3.1 at n.51 (discussing the "more widespread" adoption of an effects test).

Thus, no one disputes the propriety of U.S. government enforcers proceeding against the vitamins cartel under Section 1 of the Sherman Act, for the cartelists' conduct (price fixing, output restrictions, and customer allocations) had a "substantial

effect" on "trade or commerce . . . with foreign nations," because of its intertwined effect on imports and exports of vitamins. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); International Guidelines, *supra*, § 3.1 (enforcement agencies use "substantial effects" standard for imports; "direct, substantial, and reasonably foreseeable" standard used for foreign commerce "other than imports").

Plaintiffs contend that sales to them were part of this international conspiracy, even though made outside the United States. If this is true, Section 1 of the Sherman Act applies, subject to the same prudential limits which apply to all antitrust claims. Given the international nature of the market for vitamins, and the international scope of the conspiracy, the locus of the sale should be no more relevant than the locus of the seller. The key factor should be whether the cartel from which the plaintiffs purchased had the requisite effect on U.S. foreign commerce. The cartelists understood that the geography of buyers and sellers had nothing to do with economic effect. Section 1 should be interpreted in accord with this economic reality.

II. THE FTAIA DOES NOT CUT BACK JURISDICTION OVER THIS CASE.

Appellants assert that this case should be dismissed for lack of jurisdiction by reason of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

The FTAIA, which cut back the reach of the Sherman and Federal Trade Commission Acts to exclude conduct that harms only foreign markets, does not apply to this case. This conclusion follows from an understanding of the circumstances that led to enactment of the FTAIA, Congress's goals in enacting the FTAIA, and the relevant wording and structure of the Act.

The seeds of the Act were sown in the 1960s and 1970s. Economic regulation had expanded, U.S. businesses complained that they were overregulated and handicapped vis-à-vis foreign

competitors, and small businesses complained of fear and uncertainty in their export activity lest their conduct be caught by U.S. antitrust law. The fear had an objective basis. U.S. antitrust law was then more proscriptive than that of our trading partners, and some cases had held that U.S. antitrust law followed U.S. corporations in their business abroad even when there was no anticompetitive effect on U.S. commerce and consumers and even though the host country permitted conduct that U.S. antitrust law prohibited.[3] Congress wished to – and did – declare that U.S. antitrust law would no longer follow U.S. firms in foreign markets where only foreign market competition was injured.

Because its objective was to enhance exports, Congress specifically excluded "import trade or import commerce" from the purview of the FTAIA (first sentence, first clause).[4] To delineate the new limits of the Sherman Act, Congress provided that, henceforth, the Sherman Act would not apply to foreign conduct other than import trade unless it had "a direct, substantial and reasonably foreseeable [U.S.-relevant] effect . . . ."[5]

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[3] *E.g.*, *Waldbaum v. Worldvision Enterprises*, 1978-2 Trade Cas. (CCH) ¶ 62,378, 1978 U.S. Dist. LEXIS 14208 (S.D.N.Y. 1978); *Industria Siciliana Asfalti Bitumi, S..A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶ 66,256, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977).

[4] Also, consistent with the objective of protecting the freedom of U.S. firms to compete in foreign trade while not intruding on rights of U.S. firms, in subsection 1(B) Congress preserved the cause of action, if any, of an anticompetitively excluded U.S.-based exporter. This clause preserves case law, to the extent it survives modern interpretations, prohibiting members of an export association from agreeing to export exclusively through their association and not through other U.S. exporters. *See United States v. United States Alkali Export Association*, 86 F. Supp. 59 (S.D.N.Y. 1949).

[5] For import commerce, the jurisdictional test was last articulated by this Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993): "[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 769.

There was some concern, however, that the FTAIA might be read to create a cause of action where none previously existed. For example, a foreign plaintiff might claim that challenged conduct had *some* direct, substantial and reasonably foreseeable effect in the United States – e.g., saving jobs – and use the FTAIA as a hook for U.S. jurisdiction even if the anticompetitive effects of the conduct were solely abroad. Accordingly, the drafters specified that "such effect[6] [must] give[] rise to a claim under the provisions of this Act [the Sherman Act or the FTC Act], other than this section." H.R. Rep. No. 97-686, at 11 (1982).

The conduct at bar – the vitamins conspiracy – was "conduct . . . involving import trade or import commerce." The conspiracy involved international markets in a number of vitamins and vitamin products – an intricate, tangled, worldwide network of foreign and domestic producers, foreign and domestic victims, imports and exports. Because the cartel conduct involved "import trade [and] commerce," the FTAIA is not applicable to this case, and the *Hartford* test of jurisdiction applies.[7]

This conclusion is borne out by the fact that no one has questioned the U.S. government's criminal enforcement against the vitamin conspirators here and abroad, foreign and domestic, and no claim has been made that the government was subject to additional hurdles of the FTAIA. Indeed, the Government's criminal Informations filed against the vitamins cartel defendants (and to which the defendants pleaded guilty) alleged that

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[6] "Such effect" refers to the direct, substantial and reasonably foreseeable effect of the challenged conduct on U.S. commerce.

[7] See note 5, *supra*.

> the defendant and its co-conspirators sold and distributed a substantial quantity of vitamins and vitamin premixes subject to the charged conspiracy in a continuous and uninterrupted flow of interstate and foreign trade and commerce *to customers located in states or countries other than the states or countries in which the vitamins and vitamin premixes were produced* (emphasis added).[8]

As a result, according to the Information,

> the activities of the defendant and co-conspirators that are the subject of this Information were within the flow of, and *substantially affected*, interstate and foreign trade and commerce (emphasis added).[9]

Noticeably lacking in the Information are two things: 1) any effort to parse the locations of either the vitamins customers or the vitamins producers; and 2) any language referring to the FTAIA's jurisdictional requirements. Thus, the federal government has viewed this conspiracy as one coming within the jurisdictional reach of Section 1, to which only the *Hartford* "substantial effects" applies, unaffected by the FTAIA. *See* International Guidelines, *supra*, § 3.1.

Appellants argue, nevertheless, that the FTAIA's cutback in jurisdiction was calibrated to the nature of the plaintiff and the situs of its purchases, rather than to the nature of the commerce. This is not the case. The FTAIA concerns the limits of the Sherman Act in reprehending foreign conduct, not which private parties may sue for a violation. This conclusion follows from the FTAIA's language and purpose, and from the structure of the Export Trading Company Act of 1982 and its Title IV (which is

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[8] *United States v. F. Hoffman-La Roche Ltd*, Criminal No. 3:99-CR-184-R, N.D. Tex., at ¶ 10 (filed May 20, 1999), available at http://www.usdoj.gov/atr/cases/f2400/2452.htm.

[9] *Id.* at ¶ 11.

the FTAIA).

First, the same operative language that amends the Sherman Act amends the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a)(3). There is no private right of action under the FTC Act; only the FTC may enforce the Act. If the FTAIA had been meant to delineate which private parties can and cannot sue, the language relied on by appellants ("such effect gives rise to a claim") would have been omitted in the FTAIA amendment to the Federal Trade Commission Act.[10] Instead, the FTC Act amendment says: "such effect gives rise to a claim under the provisions of this subsection, other than this paragraph," that is, a claim under Section 5 (a) (1). *See* 15 U.S.C. § 45(a)(3)(B).

Second, the FTAIA amends Sections 1 to 7 of the Sherman Act (specifying prohibited conduct and the duty of the United States to enjoin it), not Section 4 of the Clayton Act (specifying the elements of private standing and damages). If Congress had meant to amend Section 4 of the Clayton Act, it would have done so, as it subsequently proposed to do in the "Foreign Trade Antitrust Improvements Act of 1985," a bill to cut back private remedies in foreign commerce cases which was never enacted. *See* S. 397, 99th Cong., 1st Sess. (1985).

Third, the structure of the Export Trading Company Act of 1982 also confirms the fact that the FTAIA does not read on private standing and does not parse which particular exploitative transactions are covered. The Export Trading Company Act is an act expressly designed to increase U.S. exports. During the

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[10] Note that the drafters were clearly aware of the differences between the Sherman Act and the Federal Trade Commission Act and did not simply take the language from the Sherman Act *in haec verba*. *Compare* 15 U.S.C. § 6a ("other than import trade or import commerce"; reflects "trade or commerce" language of Section 1 of the Sherman Act) *with* 15 U.S.C. § 45(a)(3) ("other than import commerce"; reflects "commerce" language of Section 5(a)(1) of Federal Trade Commission Act).

time of the drafting of and debate on this legislation, the House of Representatives presented the bill that became the FTAIA – which was intended to be a clean retraction of jurisdiction. The Senate suggested a different approach designed to achieve the same primary end – freeing U.S. firms that wished to export from fears of violating the U.S. antitrust laws. The Senate proposed a regulatory approach, requiring a filing by firms planning to export and the grant of a certificate of immunity for the export transaction to the extent it might harm only foreign markets. Congress could not decide which approach to take, and ultimately enacted both bills. The Senate version became Title III of the Export Trading Company Act of 1982. The House version became Title IV. There was acknowledgment of the duplicative nature of Titles III and IV; they are duplicative because Title III offers exporters immunity for conduct that Title IV puts beyond the reach of the Sherman Act. In no part of the debate was a shrinking of private rights identified as a reason to adopt the House bill in addition to the Senate bill. The overlap was justified on grounds that some firms – and especially small firms that might not have sophisticated counsel – would prefer advice from a federal agency (the Commerce Department) and the security of a Certificate of Review. *See* Eleanor M. Fox, Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?, 19 N.Y.U. J. Int'l L. & Pol. 565, 577-82 (1987).

The FTAIA did not remove jurisdiction over this case. The vitamins cartel is conduct involving import trade and commerce and therefore its treatment under Section 1 of the Sherman Act is not touched by the FTAIA. If plaintiffs are restricted in their rights under the Sherman Act, that restriction must be found outside of the FTAIA.

III. U.S. COURTS SHOULD NOT BE CLOSED TO PLAINTIFFS INJURED IN THEIR BUSINESS OR PROPERTY BY AN INTERNATIONAL CARTEL WITH SUBSTANTIAL U.S. EFFECTS ONLY BECAUSE PLAINTIFFS' PURCHASES ARE MADE OUTSIDE THE UNITED STATES.

No country today can conceive of its enforcement efforts against international cartels in parochial terms. Each country's efforts in policing international markets contribute to the common economic benefit.

Closing U.S. courts to plaintiffs injured by an international cartel whose effects are felt in international markets that include the United States, on the sole ground that their purchases were made outside the United States, is inconsistent with the role the United States plays in international antitrust enforcement. Indeed, crafting antitrust rules by "metes and bounds," instead of by economic effect, leads to arbitrary results and is inconsistent with the economics of these restraints and with the deterrent and compensatory function of treble damages suits. The better approach would be to use standing and other doctrines which the courts have developed to manage the potential scope of antitrust litigation.

Courts have already recognized that making liability for international cartel behavior turn on whether some aspect of the sales transaction takes place in the United States can be formalistic. *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001); *cf. Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001) (no claim for $230 million of price-fixed electrodes invoiced outside U.S.; allows suit for $18 million worth of electrodes that were invoiced in the U.S. but delivered to the plaintiffs outside the U.S., without regard to where the electrodes were manufactured). Line-drawing on this basis may be "archaic," *see Microsoft,* 127 F. Supp. 2d at 716-17 (Greek citizen purchasing from Microsoft,

using the Internet; court wonders whether this is a sale in the United States), or random, *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (auctions in New York and London; buyers bid and purchase interchangeably between the two locations).

Formalism is the wrong approach because it ignores the economics of international markets and, therefore, undermines deterrence. Where markets are not economically separable by geography, the success of the cartel depends on controlling sales without regard to geography. In cartels like vitamins, the cartelists recognize that sellers from around the world must be included and sales around the world must be accounted for (as they were). If these cartels are to be deterred, the U.S. private action cannot ignore what happens abroad. Indeed, this is the key insight of this Court in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978):

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

Id. at 315.[11]

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[11]The deterrence effects of including sales made outside the United States is more complicated than it was when *Pfizer* was decided. The chance of detection of illegal cartels is likely greater today, in major part because of the Department of Justice's amnesty program but also in part because of the greater investigative efforts of the private bar. *See* Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust L.J. 711, 712-14 (2001) (discussing efforts of private counsel in uncovering vitamins conspiracy). Greater potential civil liability might marginally decrease the incentives of parties to seek amnesty from the Government, but the benefits of amnesty remain great, the desire to beat one's competitor to the prosecutor's office will still be quite strong (a true "prisoners' dilemma"), and private investigation and enforcement is ever-present. More importantly, the increase to deterrence of including sales made in the international market, but outside the United States, would likely swamp the marginal effects from the possible diminution in the use of amnesty programs. *See* John M. Connor, Global Price Fixing at 295 (2001) (estimating approximately 75 percent of annual sales of vitamins took place outside the United States) (Table 10.4). *See also* Julian L. Clarke and Simon J. Evenett, The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel, 48 Antitrust Bull. 689, 692 (2003) (exports by vitamins cartel to countries without active cartel enforcement regimes rose more in value than exports to countries with active cartel regimes, supporting hypothesis that vitamins cartel raised prices more in nations without active antitrust enforcement).

There is today widespread agreement among nations that international price fixing cartels can no longer be tolerated, but there are still differences in enforcement mechanisms. Japan, for example, has yet to take any action against the vitamins cartel or its Japanese members, although it does pursue other, domestic cartels. *See* Akinori Uesugi, Enforcement Activity Against Cartels: What Is Going On In Japan? at 8 (largest cartel penalties) (Address to International Cartel Workshop, American Bar Ass'n, Feb. 5, 2004), available at http://www2.jftc.go.jp/e-page/speeches/040205ABA.pdf. In Europe, by contrast, large fines have been imposed on international cartels and upheld in the courts. *See, e.g., Kyowa Hakko Kogyo Co. Ltd v. Commission of the European Communities*, Case T-223/00 (Court of First Instance 2003) (upholding fine in lysine cartel), available at http://curia.eu.int/jurisp/cgi-bin/gettext.pl.).

The United States has not let these differences in institutional approach affect its willingness to proceed against international cartels even though such prosecutions, inevitably, involve non-U.S. corporations and non-U.S. individual defendants. Between

1997 and 2003, 32 of the 38 corporations fined in excess of $10 million have been non-U.S. firms (Japanese firms are the largest group by nationality); since 2001, approximately one-third of the individual defendants in international cartel cases have been from outside the United States. *See* James M. Griffin, A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Aug. 12, 2003), available at http://www.usdoj.gov/atr/public/speeches/201477.htm.

Just as there is no reason to decline to prosecute non-U.S. firms because other jurisdictions might have different views of such prosecutions, similarly, there is no reason for the United States to abjure the deterrent and compensatory effects of the private damages action because other jurisdictions might not yet have well-developed private rights of action. If anything, the lack of a developed private damages action in other jurisdictions, and, even more critically, the complete lack of this remedy in less-developed countries, makes the case more compelling for not barring our courts to plaintiffs injured by a cartel operating in international markets just because the plaintiffs' purchases were made abroad.

The United States has a well-developed antitrust system available to compensate the victims of price-fixing. Courts have adopted a number of prudential doctrines to insure that these damages actions are kept within reasonable bounds, particularly doctrines relating to standing. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 877 (2004) (concurring opinion of Stevens, J.). Using these doctrines is the appropriate way to balance our policy of compensating victims against the potential for abuse. Completely barring these cases from U.S. courts is not the appropriate way, for it strands these plaintiffs outside the courthouse, with their injuries unrecompensed, and it leaves the profits made from these sales in the hands of the very companies who have violated United States law. Such a

result is inconsistent with the important role the United States plays in antitrust enforcement against international cartels.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

F. HOFFMAN-LAROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN S.A., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS DARREN BUSH, JOHN M. CONNOR, JOHN J. FLYNN, SHUBHA GHOSH, WARREN GRIMES, JOSEPH E. HARRINGTON, JR., NORMAN HAWKER, ROBERT LANDE, WILLIAM G. SHEPHERD AND STEVEN SEMERARO IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION 2

ARGUMENT 4

1. THE VITAMINS CARTEL, 1990-1999 4

2. AFFECTED SALES OF THE VITAMINS CARTEL 9

3. ECONOMIC INJURIES CAUSED BY THE VITAMINS CARTEL 12

4. CORPORATE CARTEL SANCTIONS 15

5. THE VITAMINS CARTEL'S SANCTIONS 19

6. THE VITAMINS CARTEL IS NOT ATYPICAL 21

7. INTERNATIONAL CARTEL RECIDIVISM 22

8. DETERRING INTERNATIONAL CARTELS 25

PRINCIPAL CONCLUSIONS 29

TABLE OF AUTHORITIES

PAGE

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Commission Case COMP/E-1/37.512 – Vitamins, Commission Decision of Nov. 1, 2001, reprinted in L-6 *Official Journal of the European Communities* 1 (10.1.2003) 4, 6, 11, 13
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Sherman Act, 15 U.S.C §1, *et. seq*. 3, 19
U.S. Sentencing Guidelines 2R1.1(d) 16
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RULES

Rule 37.6 1

INTERESTS OF *AMICI CURIAE*

Amici curiae are a group of professors of law and economics with expertise in antitrust and the economics of competition. They submit this brief in order to bring their economic analysis of global price-fixing cartels – in terms both of effects and deterrence – before the Court:[1]

Darren Bush is Assistant Professor of Law at the University of Houston Law Center.

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[1] *Amicus* Professor John M. Connor has written extensively on the law and economics of global price-fixing conspiracies and is among the leading scholars of the vitamins cartel that is the subject of the instant action. Professor Connor undertook initial drafting of this brief, which relies heavily upon his published scholarship. In compliance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The university affiliations of *amici* are provided for identification purposes only.

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INTRODUCTION

The past decade has witnessed nothing less than an explosion in the discovery of private international cartels with global price-fixing ambitions.[2] This brief presents two major economic arguments in support of the decision below. First, in the context of international price-fixing conspiracies conduct relating to "wholly foreign" purchases necessarily affects domestic commerce. This is because international cartels must prevent international geographic arbitrage in order to succeed in controlling prices in any targeted national market.

Second, this brief assembles empirical evidence that, in the absence of affirmance of the judgment below, the global aspirations of contemporary cartels offer an insuperable challenge to a core aim of the antitrust laws: Deterrence. The broad geographic harm generated by the scores of modern global price-fixing conspiracies has overwhelmed the ability of corporate antitrust sanctions to provide enough financial disincentives to discourage the formation of similar cartels in the future. These sanctions have been inadequate to deter cartel formation because the probability of being caught by one or more of the world's antitrust authorities

[2] During 2000-2003 the world's antitrust authorities have had to cope on average with 23 newly discovered international cartels per year; in the first half of the 1990s, fewer than four were discovered each year on average. Connor, "Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement,"("Private International Cartels"), Research in Agricultural and Applied Economics, Staff Paper 03-12 at 15 (2003), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=11506&ftype=.pdf.

remains well below 100% and because the *expected* illegal monopoly profits made worldwide are more than sufficient to compensate would-be conspirators for their *expected* liabilities in jurisdictions with effective antitrust laws and enforcement.[3] Permitting foreign buyers who purchased the products of international cartels abroad to pursue civil antitrust damages actions in U.S. courts is necessary to produce the level of damages needed to protect the U.S. economy and its consumers from future cartel injuries. Affirmance will also enhance the probability of discovery of clandestine cartels by multiplying the number of jurisdictions in which private parties have an incentive to investigate collusive behavior.

The purpose of this brief is to validate these conclusions by drawing upon research on private international cartels published in the past six years. To do so, this brief will describe in concrete detail the salient economic features of the global vitamins cartel; calculations of the amount of injury caused for buyers in the United States and elsewhere; corporate financial sanctions imposed; the ways in which this cartel are similar to others prosecuted in the past decade; evidence of recidivism in international price fixing; and how deterrence will be significantly enhanced should wholly foreign direct buyers be permitted to go forward with this and similar suits under the Sherman Act.

[3] The OECD presents survey data from a large number of countries showing that national antitrust fines imposed on international cartels in the late 1990s failed to recover single damages. Organization of Economic Co-Operation and Development, Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels Under National Competition Laws (April 9, 2002), Annex A available at http://www.oecd.org/dataoecd/16/20/2081831.pdf. Another study also concluded that deterrence of contemporary cartels by national antitrust authorities is insufficient. Evenett, Levenstein, and Suslow, "International Cartel Enforcement: Lessons from the 1990s," 24 *World Economy* 1221, 1244 (2001).

This research demonstrates that the international vitamin cartel generated the largest total of antitrust fines and penalties in history, which are calculated to be between $4.4 and $5.6 billion. But the cartel's monopoly profits in all areas of the world were $9 to $13 billion. Thus, the criminal and civil justice systems of the globe produced fines and damages that amounted to only about half of this cartel's illegal profits. These sanctions are much less than the amount needed to discourage future cartel formation. One of the best ways to discourage cartels is to increase the expected costs in the event the participants are caught, in order that the expected penalties exceed the expected benefits. As a practical matter, this deterrence benefit to the United States' consumers and its economy – something surely intended by Congress – is likely to be achieved only if federal law is construed to give injured foreign customers like Respondents the power to sue in the courts of the United States under American antitrust laws.

ARGUMENT

1. THE VITAMINS CARTEL, 1990-1999.

Decisions about raising the prices of vitamins A and E began in discussions in Switzerland and Germany among F. Hoffmann-LaRoche, BASF, and Rhône-Poulenc (now Aventis) in late 1989.[4] Soon afterward the Japanese chemical manufacturer Eisai agreed to raise the price of

[4] Information about the cartel is drawn from published sources, including Connor, Global Price Fixing: Our Customers are the Enemy ("Global Price Fixing") 277-337, 368-379, 405-407, 463-476 (2001), supplemented by scores of publicly available press accounts. A particularly rich source of information is the European Commission's decision of November 21, 2001. See Commission Case COMP/E-1/37.512 – Vitamins, Commission Decision of November 21, 2001 ("EC Vitamins Case"), reprinted in L-6 *Official Journal of the European Communities* 1 (10.1.2003) available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_006/l_00620030110en00010089.pdf .

vitamin E effective January 1990. It was logical for the conspirators to begin with vitamins A and E because they had the largest sales of the 16 products that would eventually be cartelized, were dominated by the four manufacturers (at least 87% of global supply), and were well protected from entry by new sellers because of the difficulty of the synthetic chemistry involved.[5] The number of cartelized products grew to eight by January 1991, and by the end of 1991 at least 20 parent-company manufacturers would be involved in a conspiracy involving 16 products.

With respect to two products, price fixing was effective for only four years, but with respect to most this was a durable conspiracy. Price fixing of vitamin H became ineffective in April 1994 after 30 months of operation, and the cartel ceased price control of vitamin C shortly thereafter because of a flood of Chinese exports induced by cartel-inflated high prices. However, with respect to many products the cartel was still effectively raising prices above non-collusive levels in February 1999 when definitive evidence of the conspiracy came into the hands of DOJ from a company seeking leniency in exchange for cooperation. With respect to one product, the cartel was active for nearly 11 years; with respect to several others, the cartel operated effectively for nearly ten years.

[5] The products ultimately involved were vitamins A, B1, B2, B3 (niacin), B4 (choline chloride), B5, B6, B9 (folic acid), B12, C, D3, and H (biotin); three carotinoids; and vitamin premixes. The U.S. Department of Justice (DOJ), Canadian Competition Bureau (CBC), and European Commission fined the defendants for violations with respect to different combinations of these 16 products. For example, only the DOJ fined firms for premixes, only the CBC for B12, and only the EC for D3; however all three entities prosecuted the makers of vitamins A, E, C, and many other vitamins.

Whether tracked in euros, U.S. dollars, or Swiss francs, market prices in the United States, Canada, and Western Europe began to rise almost immediately after higher list prices were announced by the vitamins manufacturers.[6] In the cases of some products prices peaked just before the cartel was exposed; in others they peaked years before the cartel's ability to fix prices with respect to that product dissolved. But in all cases, selling prices rose to levels greater than those observed prior to the collusive agreements and well above those observed after they broke apart. The price increases cannot be fully explained by either increases in production cost or by unexpected surges in demand. The pattern of price changes in North America and Europe are remarkably parallel. Prices in all other parts of the world were similarly affected, though the average overcharges may have varied slightly from those observed in North America or Western Europe.[7]

Besides setting list prices and rigging bids on tenders from larger customers, the vitamin makers engaged in much other conduct in order to assure the success of their conspiracy to fix prices. Global Price Fixing, supra n. 4, 305-317. They agreed on global and regional sales quotas, generally based on historical levels. They shared production and sales information to monitor their adherence to prices and market allocations. They developed plans to thwart entry by producers outside the collusive groups. They set many common terms of sale, such as discounts, delivery, and restrictions on customers' resales.

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[6] See EC Vitamins Case 86-89; Global Price Fixing 319-331.

[7] An official statement describing the price effects in South Korea, for example, which imports all its vitamin supplies, confirms the similarity in price effects. Korea Fair Trade Commission, "The KFTC Imposes Surcharges on the International Cartel of Vitamin Companies" (Press Release April 25, 2003, available at http://ftc.go.kr/data/hwp/vitaminl.doc).

The cartel was managed through three levels of managers; the lowest level had face-to-face meetings quarterly to adjust prices in several currencies. The frequency of these meetings is instructive. Although with respect to each product the cartel had impressive coordination of total industry supply and market prices, it had a limited ability to affect changes in demand and no power over currency exchange rates. With few exceptions, the markets into which the vitamins cartel sold products had floating currency exchange rates that moved daily in response to changes in macroeconomic conditions. Moreover, it is important to note that bulk vitamins were high priced, storable commodities that were usually shipped in large quantities great distances.[8] International shipping costs for vitamins in the 1990s were well under 5% of the manufacturers' price.[9] Under such conditions, if changes in

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[8] The majority of the cartel's members had most of their vitamin factories in Europe, from which they exported the majority of the output to other continents. The majority of U.S. consumption was satisfied by imports. During the affected periods, vitamin A sold for $100-$200/lb., vitamin E for $60-$90/lb., vitamin C $30-$40/lb., and most of the other vitamins in between.

[9] Europe-U.S. and Europe-Asia transportation costs for these products were less than $1/lb. These low oceanic transport rates can be inferred from data published by UNCTAD, see United Nations Conference on Trade and Development, *World Maritime Transport 1998* 71 (1998), which shows that for all commodities the ratio of transport costs to import value was 5% in 1990 and 1995; most internationally traded goods are much lower in price than organic chemicals, which is what vitamins are. Other evidence was supplied in exhibits submitted in the lysine trial *United States v. Andreas,* No. 96 CR 762 (N.D. Ill.). See Global Price Fixing 217-219. ADM spent only $0.10 to $0.13 per pound in transporting, storing, and merchandising lysine made in Illinois and shipped everywhere in the world at a time when lysine sold for merely $0.85 to $1.25 per pound. Lysine international transfer costs were thus from 8% to 15% of sales value, yet the lysine-cartel managers expressed worries about geographic arbitrage.

currency exchange rates were sharp enough, buyers would find it profitable to sell stored vitamins from countries with depreciated currencies to countries with appreciated currencies; prices in the latter areas would then fall below the cartel's preferred levels. This is called *geographic arbitrage.*

Arbitrage undermines the ability of international cartels to set prices at the most profitable level in each currency zone and could even destroy collusive arrangements. For example, during 1990-1998 the value of the U.S. dollar relative to the Deutschmark varied by as much as 41%, and during 1991 the rates changed by more than 25%. Consider what might happen if the vitamins cartel set the national prices of its vitamins only once each year. If the vitamins cartel set the price of vitamin E in Deutschmarks when this currency was weak against the dollar, a U.S. chemical wholesaler could make a quick and handsome profit by exporting the vitamin to Germany when the Deutschmark later strengthened.[10] The cartel would sell a greater amount of vitamins at a relatively low price in the United States but would lose the high priced sales in Germany to this entrepreneurial exporter. If sales diversions of this type became large enough, the total monopoly profits could decline to a level inadequate to compensate the cartel members for their legal risk. Many cartels attempt to forbid the practice of reselling by their customers. But the only

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See infra at 9. In terms of its ability to enter international trade, lysine is very much like most bulk vitamins,-a powder that must be protected from humidity.

[10] In 1991 the Deutschmark was worth as little as $0.55 and appreciated to $0.69. See http://www.oanda.com/convert/fx history. Even if transportation costs were a generous 5% of export costs, by timing its purchase and resale correctly our hypothetical U.S. wholesaler could sell at a net increase in price of 20% and make a much higher mark-up on the export transaction than it would make in the U.S. market. If the dollar strengthened against the Mark, the incentive for a reverse diversion would occur.

way cartelists can effectively prevent geographic arbitrage is to make it unprofitable by frequently resetting domestic cartel prices in all regions of the world using current exchange rates to ensure that prices remain close together.

We know from direct evidence that comparable cartels were conscious of the problem presented by geographic arbitrage. Despite the increased danger of discovery, most modern cartels have had quarterly meetings to deal with this problem. In its three years of operation, the well-documented lysine cartel had at least 23 face-to-face meetings in order to adjust local prices in various currencies whenever exchange movements got the cartel's prices out of line for maximum profitability. Global Price Fixing 203. During that cartel's first few months of operation, the price was set in U.S. dollars only. By the end of the cartel, prices were set in at least nine currencies. Id. 238. A memorandum of a meeting of the cartel in Paris in 1993 written by an executive of the Ajinomoto Co. specifically refers to the need to combat geographic arbitrage by non-cooperative wholesalers:

> With the [Deutschmark] strong against the $, presently it is 22% higher than in the U.S. If the difference between Europe and the U.S. becomes bigger, ill-reputed dealers will start working and goods will enter Europe from the U.S. and decrease the price.[11]

2. AFFECTED SALES OF THE VITAMINS CARTEL.

Although the vitamins cartel is not different in kind from other international cartels of the late 20th century, it was one of exceptionally large scale. The most conventional measure of a cartel's size is *affected commerce*, i.e., the sales revenues generated by the cartelized product during the

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[11] *United States v. Andreas*, No. 96 CR 762 (N.D. Ill.), Trial Exhibit 10-T (translation from Japanese).

price-fixing period.[12] The dates of effective price control by the vitamins cartel are well known. Sales in the U.S., Canadian, and EU markets are also known with a fair degree of precision.[13] Sales in other parts of the world can be estimated as a residual amount after ascertaining the world totals.

The total affected sales in the United States were once estimated to have been as low as $5 billion in public statements by DOJ officials. See "US Slaps Two Big European Companies with Huge Fines in Vitamin Case," Agence France Press, May 20, 1999 (quoting Assistant Attorney General Joel Klein). This figure appears to include only a few of the largest vitamins, whereas subsequent prosecutions make it clear that the cartel involved a wider array of vitamins and vitamin premixes. A reasonable estimate of U.S. affected sales of the full array of 16 vitamin products is approximately $7.4 billion.

Sales of the vitamins cartel in the European Economic Area[14] were released by the European

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[12] Affected sales are normally dated from the time at which the first agreement was made until the date of the cartel's last meeting. Another approach is to begin counting sales on the first date on which an agreed change in list or transaction prices were changed or became effective. In this brief we follow the more conservative second approach. Both approaches undercount sales in the months following the formal dissolution of a cartel when prices remain elevated above what they would otherwise be in the absence of unlawful collusion because of institutional lags in price cuts.

[13] Sales data for vitamin premixes are difficult to obtain, and it is not always clear that total published or asserted sales data for all vitamins include premixes. Vitamin premixes are mixtures of bulk vitamins that are tailored for the nutritional needs of various types of farm animals. The United States is the only jurisdiction in which the vitamins manufacturers were sanctioned for price fixing the market for premixes.

[14] The EEA includes the EU and a few other countries that are members of the European Free Trade Area but that have not joined

Commission in its published decision regarding the fines imposed on the conspiring manufacturers. See EC Vitamins Case at 4. The affected sales of bulk vitamins (not including premixes) in the EEA are estimated to have been US$8.3 billion. Affected sales in Canada were given in statements of the Canadian Competition Bureau to be C$700 to C$750 million (US$530 to US$570). Finally, based upon reports of global sales it is possible to estimate sales in the rest of the world (primarily Asia, Africa, and Latin America). During the price-fixing period, sales of bulk vitamins in the rest of the world were approximately $18.2 billion. Therefore, global affected commerce of bulk vitamins and premixes (the latter in the United States only), reached $34.3 billion – the largest amount of affected commerce ever to result from a global price-fixing cartel.[15]

The significance of this sales calculation lies in the geographic location of vitamins sales during the cartel's active period. The three jurisdictions with the most effective anticartel enforcement – the USA, Canada, and the EU – accounted for less than half of worldwide sales.[16] It follows that, if the rate of monopoly profits made by the cartelists was roughly the same across the globe, then the *majority* of those profits were made in jurisdictions where anticartel

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the EU; Norway is an example. These countries have agreed to allow the EC to enforce its competition laws in their national jurisdictions. Harding and Joshua, Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency 93 (2003).

[15] The largest set of affected commerce data on post-1980 international cartels can be found in Private International Cartels. The intra-European cement cartel, which was fined by the EU in January 1992, might have been slightly larger as measured by affected commerce at least when adjusted for inflation. The cement cartel, however, was not a global cartel in the sense being used in this brief.

[16] The USA, Canada, and the EU accounted for 21%, 2%, and 25% of affected world vitamin sales, respectively. Data on file with *amicus* Connor.

enforcement is weak or nonexistent. The ability of international cartelists to garner monopoly profits in weak antitrust jurisdictions adversely affects deterrence.

3. ECONOMIC INJURIES CAUSED BY THE VITAMINS CARTEL.

Numerous economic analyses have been conducted by economists and parties to private suits in the United States in which calculations of the economic injuries caused by vitamins price fixing were central issues. There appears to be a substantial consensus among these individuals on the size of the vitamins cartel's price-fixing overcharges.

On May 20, 1999, the day the guilty pleas of the three largest members of the vitamins cartel were announced, Assistant Attorney General Joel Klein stated:

> The vitamin cartel is the most pervasive and harmful criminal antitrust conspiracy ever uncovered... The enormous effort that went into maintaining the conspiracy reflects the magnitude of the illegal revenues it generated... [17]

Several subsequent statements by DOJ officials echoed the assertion that the vitamins cartel was the most injurious to the U.S. economy of any international price-fixing conspiracy ever prosecuted by the United States.[18]

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[17] "Press Conference with Attorney General Janet Reno and Joel Klein, Assistant Attorney General, Antitrust Division," Federal News Service, May 20, 1999.

[18] See, *e.g.*, Testimony of Joel I. Klein, Assistant Attorney General, Department of Justice, before the House Judiciary Committee, Federal Document Clearinghouse Congressional Testimony, April 11, 2000. The only other U.S. case that is a contender for the most harmful cartel is the heavy electric power equipment conspiracy that was prosecuted in 1960-61, but this was a solely domestic cartel and its price effects were relatively small. See Connor and Lande, "Price-Fixing Overcharges: Legal and

Prosecutors for the Canadian Ministry of Justice that handled the vitamins case were quoted in the press stating that vitamins prices were 30% higher than competitive levels. Global Price Fixing 405. Similarly, the vitamins decision of the European Commission clearly concludes that the cartels caused a significant increase in EU prices of bulk vitamins. EC Vitamins Case at 69. That fact that the three governments imposed on the vitamins conspirators fines that were the highest in history speaks for itself.

Unlike DOJ's terse press releases and sentencing memoranda, the EC decision is exemplary in providing numerous details about the operations, size, and European price effects of the vitamins cartel. From graphical evidence provided on the prices of seven vitamins, it is clear that the prices in euros rose significantly compared to the years before price fixing began. Id. at 86-89. Moreover, the post-cartel prices are lower than the pre-cartel prices, a trend that suggests that costs of production during the relevant period probably fell. Therefore, applying a simple before-and-after technique to calculate price effects will in all likelihood provide estimates that understate the true overcharge. See Connor, "Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation" in Kwoka and White, eds., The Antitrust Revolution 263-267. (4th ed. 2004).

The simple mean price-fixing overcharge in the EU was 29% when measured with the pre-cartel prices as the competitive benchmark and 38% when applying post-cartel prices as the benchmark (i.e., the so-called but-for price).[19]

Economic Evidence," Staff Paper, Research in Agricultural and Applied Economics, available at http://agecon.lib.umn.edu (forthcoming 2004).

[19] These were highly concentrated markets before and during the collusive conduct. It is likely that tacit collusion marked the behavior of these industries prior to the formation of the cartels. Thus, the benchmark prices used here probably are above perfectly competitive levels. The median overcharges were 25%.

The price effects were highest for vitamin E, the largest product in terms of sales, and lowest for vitamin C, a product that was subject to stiff import competition from Chinese manufacturers after a relatively short time. See Global Price Fixing 336. If one weights the overcharges by the sales sizes of the individual products, the mean overcharge was 31% to 42%.

In a case involving choline chloride, vitamin B4, one of the smaller vitamins, Mitsui, DuCoa, Chinook, and affiliated companies were found guilty of price-fixing in a conspiracy that ended in 2003. The jury found the injury to be $49.5 million and awarded treble damages. See "4 Companies Found Liable In Price Fixing Of Vitamin B4," New York Times, June 15, 2003 at A20. This overcharge conservatively represents 38% of affected sales.

Finally, there have been a number of empirical studies of the price effects of the vitamins cartel by academic economists and economic historians. Professor Connor's estimates are on average somewhat lower than the EU price effects: allowing for some uncertainty, he concluded the weighted average is 25% to 28% of affected commerce. Global Price Fixing 336. In the United States, as in Europe, vitamin E had the highest U.S. overcharge rate and vitamin C one of the lowest. Applying the U.S. overcharge rates to global sales results in an estimated world overcharge of $7 to $8 billion. Id. Economic historians Suslow and Levenstein cited North American overcharge figures of 20% and 30% in a survey of modern cartels. Connor and Lande, supra n. 18, App. Table 2. A sophisticated econometric model of world trade in bulk vitamins also yielded conclusions about collusive price effects. See Clarke and Evenett, "The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel," AEI-Brookings Joint Center Working Paper 02-13, Table 7 at 31 (2002) available at http://www.aei-brookings.org/admin/authorpdfs/page.php?id=218. What is of special interest about this

study is that the authors are able to calculate overcharges for the 19 countries outside the EU and North America with the strictest antitrust laws separately from those countries with weak antitrust enforcement; the former had overcharges averaging 13% while the latter incurred a 33% overcharge. Therefore, it seems likely that monopoly profit rates from collusion in the rest of the world are higher than in the United States, Canada and the EU. Finally, from a cutting-edge dynamic simulation model fitted to parameters drawn from the vitamin C industry, one scholar predicted the U.S. price during fully collusive and non-collusive regimes. See de Roos, "Collusion with a Competitive Fringe: An Application to Vitamin C," 20-28 (unpublished manuscript October 2001) available at http://www.econ.yale.edu/~njd7/docs/vitc.pdf. His results are that U.S. vitamin C prices were 22% to 26% higher during the cartel period, which is quite remarkable given that this is was one of the products with respect to which the cartel was weakest and most fragile.

To summarize, the average price effects of the vitamins cartel appear to be lowest for buyers in the United States, averaging somewhere in the 20% to 35% range. Canada and Europe were higher, roughly in the 30% to 40% range. The rest of the word came closer to European levels than to U.S. levels. Applying these price effects to the affected sales mentioned in the previous section implies that global injuries were between $9 and $13 billion, of which 15% accrued in the United States, 1% in Canada, 26% in the EU, and 58% in the rest of the world.

4. CORPORATE CARTEL SANCTIONS.

The vitamins cartel has been the most harshly sanctioned conspiracy in antitrust history. Private International Cartels, supra n. 2, at 47-49, 52-53, 56-57, 106-111. This section focuses on corporate monetary antitrust penalties, recognizing that corporate persons may be deterred in less measurable ways and that individuals were also punished. Personal financial penalties, though small by

comparison to corporate ones, and more serious personal criminal sanctions, may add to or interact with corporate sanctions in discouraging the formation or enlargement of cartels, but they are difficult to incorporate into a unified calculus of collusive deterrence.

Sanctions that would be imposed in the absence of an affirmance in the instant case will be inadequate to deter global price-fixing cartels. The Sentencing Guidelines, for example, call for a base fine of 20% of "affected sales" when an organization is being fined for price-fixing. See USSG 2R1.1(d). These may be adjusted by a multiplier as high as 4.0 depending upon the defendant's "culpability score. Id. at 8C2.6; 8C2.5. In practice, most guilty international cartel participants earn culpability multipliers of from 1.5 to 3.5. Global Price Fixing 356-378.

Unless global conduct is held unlawful as a matter of United States law, only *U.S.* affected sales will be used in calculating the base fine. Using *global* sales to determine harm could increase the maximum liability of typical international price fixers by a multiple of three to six.

Further, in discussing the economic effects of anticartel sanctions, it is essential to distinguish theoretically available legal sanctions from those actually applied as a matter of custom and policy. Historically, the Government has also ordinarily recommended substantial downward departures in these cases even from the fine levels specified by the Guidelines.[20] Members of modern international cartels have been granted very large downward departures for minimal cooperation almost as a matter of course, driving actual fines down well below single U.S. damages in almost all cases. Global Price Fixing 356-377. In the vitamins case,

[20] *Amicus* Connor is aware of only one instance in which a defendant in a global cartel was required to pay a fine close to the maximum amount specified in the Guidelines: Mitsubishi after an adverse jury decision in the graphite electrodes case.

the second through fifth firms to plead guilty were granted average downward departures of about 80% from the Guidelines' maximum fines. Global Price Fixing 375. As a result of U.S. sentencing practices, its criminal fines amounted to less than 11% of the vitamins cartel's global monopoly profits.

The EU has quite different standards for imposing its administrative fines, which are calculated on the basis of the seriousness and duration of the violation. The European Commission (EC) is limited to imposing a maximum fine of 10% of a firm's global sales in the year prior to the Commission's action. For a single-product firm with sales only in the EU, the maximum EU fine could be a large share of the profits accruing from a fairly harmful cartel. However, most members of global cartels are highly diversified firms, and the cartelized product is a small share of the company's portfolio. For example, for the leading member of the vitamins cartel, F. Hoffmann-LaRoche, vitamins accounted for merely 8% of its total sales. For such firms, a durable high-overcharge cartel can easily generate monopoly profits well above what an EU fine could possibly disgorge. Moreover, as in the United States, generous reductions in fines are routinely granted for minimal cooperation with the EC. Actual fines imposed by the EC for the same global cartels have on average been about 20% lower than those imposed in the United States. Connor, "La Mondalisation des Délits en Col Blanc: Les Cartels Agroalimentaires des Années 1990," 277-278 *Économie rurale* 99, 119 (Septembre-Décembre 2003).

The Clayton Act appears to be unique among the world's antitrust statutes in permitting treble damages for direct purchases from effective cartels. Harding and Joshua, Regulating Cartels in Europe 236-239 In the case of the vitamins cartel, if U.S. buyers actually recovered treble damages, this alone would have amounted to about 45% of the global monopoly profits made by this cartel. Should

Respondents be permitted to proceed, private recovery could amount to 300% of global damages instead of 45%. Clearly the question of standing can mightily affect the ability of private antitrust actions to deter international price fixing.

Because of various practical impediments, private plaintiffs have rarely if ever attained treble damages. Historically, what has been observed for domestic price-fixing cases is that direct purchasers have recouped on average less than single damages. See Lande, "Are Antitrust 'Treble' Damages Really Single Damages?," 54 *Ohio State L. J.* 115, 171 (1993).[21] The recovery rate for contemporary international cartels is also below single damages; only three examples could be found of settlements above single damages, and none as high as double damages. Private International Cartels App. Table 6B at 129-31.[22] However, if wholly foreign direct buyers were to be permitted to bring treble-damage suits in U.S. courts, recoveries at historical rates would push total private recoveries to an average of about 75% of global overcharges.[23] Combined with fines,

[21] Recovery by indirect purchasers is available to residents of less than half of the States. Settlement amounts in indirect purchaser suits against vitamins defendants are difficult to document because most terms are confidential, but are believed to be well under single damages in all cases, typically a small percentage of damages. Indirect-purchaser suits of international cartels prosecuted by coalitions of state attorneys-general are of a similar order of magnitude. In 2001 a coalition of state attorneys general negotiated a record $255 million settlement for sales to indirect purchasers with the six leading vitamins cartel defendants, less than 4% of global injuries. See "Ryan Announces Historic $255 Million Antitrust Settlements Against International Vitamin Cartel," PR Newswire, October 10, 2000.

[22] The median ratio of settlement payouts to overcharges is 76%. Private International Cartels 59 (Table 20).

[23] Information on legal costs for defendants is scanty. In one well documented case (ADM lysine), legal cost amounted to 9% of its total antitrust payouts. Global Price Fixing 536.

these expanded private damages could approach optimal deterrence.

In sum, the maximum financial antitrust liability that would face global cartels in the absence of affirmance here would be, *de jure*, the sum of (1) five to six times the harm generated in the United States, (2) approximately single U.S. damages in the European Union, and (3) negligible fines or penalties elsewhere. As noted above, the injuries caused by global cartels spread beyond North America and Western Europe. Therefore, as a proportion of the monopoly profits garnered worldwide, the theoretical upper limit of lawful antitrust liability would be limited to approximately double global damages. *De facto* the application of fines and private suits to global cartels has resulted in total monetary sanctions that have been less than double actual global damages in all cases and less than single damages on average. In the end, then, even international cartels that are uncovered and prosecuted tend to be profitable. As explained below, such sanctions offer woefully suboptimal deterrence, but under the reading of the Sherman Act adopted below, deterrence might approach optimal levels.

5. THE VITAMINS CARTEL'S SANCTIONS.

The first source of monetary sanctions imposed upon the participants in the vitamins cartels were government fines, first imposed on the vitamins defendants by U.S. courts in a series of guilty pleas beginning in 1999. All who are likely to plead appear now to have done so, with a total of $907 million collected in criminal fines. Canada was next with criminal fines of $100 million paid. The EU imposed administrative fines of $759 million in 2001.[24] Australia ordered a fine of $14 million and South Korea $3 million. Private International Cartels 56. Japan and Switzerland

[24] These fines are under appeal and could be reduced, as they often are, by the Court of First Instance of the European Community.

issued warnings to members of the cartel, but no fines. While Brazil and other jurisdictions are investigating the vitamins cartel, no further major fines are expected to be imposed in this case.

The second major source of sanctions is private actions by direct buyers, principally in the United States. Several federal cases have been resolved, with a total to date of $596 million in recovery and legal fees and costs. The biggest gap in our knowledge of the amount of sanctions is the size of the settlements for opt-outs from the so-called domestic "all-vitamins" class action, *In re: Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.D.C.). About 225 companies of the 4000 original class-action plaintiffs opted to litigate on their own. As these opt-outs represented more than 75% of class purchases, their settlements are likely to be substantial. Assuming that they will settle for a somewhat larger percentage of affected sales than those buyers that remained in the class, *amicus* Connor estimates the total payout to be in the range of $1200 to $2400 million. Similar civil actions are being litigated in Australia and Canada but are unlikely to result in large recoveries. In the EU and the rest of the world civil liability is negligible for-price fixing violations. Harding and Joshua, Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency 236-239 (2003). While single damages are permitted in theory in a few European national courts, various practical impediments exist. Id.

To summarize, if foreign sales like those at issue in the instant case are not unlawful as a matter of American law, so that the Government must calculate base fines solely on the basis of domestic affected sales, then the maximum fine on international cartels by the United States, Canadian, and EU authorities will typically amount to less than double the damage caused by the cartel in the United States. Civil liability is confined almost entirely to the U.S. court system and is unlikely to exceed double these U.S. damages. If an

international cartel confined its sales solely to the U.S. market, its members might face the prospect of treble or quadruple damages, but few international cartels are configured this way.[25] Rather, sales and profits made in the U.S. market are typically less than one-third or one-fourth of the total. In such cases, fines and penalties in all jurisdictions will be less than global monopoly profits.

In the specific case of the vitamins cartel, the total antitrust fines and penalties are reckoned to be between $4.4 and $5.6 billion. But, as was shown above, the best estimates of the cartel's monopoly profits in all areas of the world are $9 to $13 billion. The criminal and civil justice systems of the globe thus have failed to recover more than half of the cartel's illegal profits.

6. THE VITAMINS CARTEL IS NOT ATYPICAL.

Most of the other international cartels of 1990s resemble the vitamins cartel in their operation, effectiveness, and sanctions imposed:[26]

- Vitamins are organic chemicals; 49 of the 167 products that were the subject of price-fixing cartels uncovered by authorities between January 1990 and July 2003 were in organic chemicals markets.
- The vitamins conspirators were almost all manufacturers; the great majority of global cartelists are manufacturers.
- One-fourth of all international cartels sold to dispersed customers in the food and agricultural industries; half of the bulk vitamins ended up in animal feeds.

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[25] Only 18 cases out of 167 modern international cartels were configured this way. Private International Cartels App. Table 3 at 115-120.

[26] These facts are drawn Private International Cartels, *passim*, and Global Price Fixing 277-318.

- The typical international cartel made less than half of its revenues in North America and the EU; so did the vitamins cartel.
- The median number of companies forming international cartels was five; the median number of companies involved in the vitamins cartel with respect to each product was three.
- More than 80% of international price fixers are headquartered in the EU or Japan; in vitamins it was 80%.
- No international cartel sold a differentiated consumer product; vitamins are unique chemicals sold to other manufacturers.
- In common with all other cartels, the vitamins cartel needed to combat the effects of international arbitrage on prices in high-prices regions.
- The mean duration of the vitamins cartel with respect to each product was 69 months; for all global cartels, 60 months; for all international cartels uncovered in 1996-1999, 75 months.
- The global financial antitrust penalties imposed on the vitamins conspirators was 31% to 58% of economic harm caused; for international cartels affecting 29 products, the mean was 55%.
- The total financial antitrust penalties imposed on the vitamins conspirators was 12% to 16% of affected sales; the mean ratio for international cartels affecting 65 products was 12%.

7. INTERNATIONAL CARTEL RECIDIVISM.

Several of the vitamins manufacturers have been fined previously for price-fixing violations under U.S. or EU competition law. Global Price Fixing 499-500. F. Hoffmann-LaRoche or its holding company Roche AG,

engaged in an overlapping price-fixing agreement with respect to 12 vitamin products. Roche, one of the two companies identified as the ringleaders of the vitamins cartel, was fined $14 million by the United States in 1997 for its leading role in the citric acid cartel of 1991-1995. Global Price Fixing 395. Roche executives were obligated to provide full cooperation in antitrust matters by virtue of Roche's guilty plea in the citric acid case, yet they continued to conspire on vitamins prices for two more years. Moreover, there was testimony given at trial in 1998 in *U.S. v. Andreas,* No. 96 CR 762 (N.D. Ill.), that F. Hoffman-LaRoche had been a member of another, clandestine international cartel in the citric acid market in the late 1980s. Global Price Fixing 136. Although a U.S. pharmaceutical company was allegedly a member, this earlier citric acid conspiracy was never uncovered by any antitrust authorities.[27] Thus, there is credible evidence that Roche is a true recidivist is the narrowest sense of the term.

Roche is not the only convicted member of the vitamins cartel to be fined for international price fixing in another line of business. The large French chemical manufacturer Rhône-Poulenc, which in 1999 merged with the leading German chemical firm Höchst to form Aventis, was subsequently given amnesty in 1999 by the European Commission for its role in the global conspiracy in the market for the amino acid methionine. Private International Cartels Table A.1. Höchst itself, which conspired with respect to vitamin B12, was convicted and fined $36 million

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[27] Unrebutted testimony in the same trial also revealed that two of the Japanese members of the global lysine cartel had thrice previously formed both international and domestic U.S. cartels in the lysine market. Connor, "'Our Customers Are Our Enemies:' The Lysine Cartel of 1992-1995," 18 *Review of Industrial Organization* 5, 6-7 (2001). Thus, two of the five lysine defendants convicted by the United States in 1996 had by that time fixed prices of lysine on *four separate occasions*.

by the United States in 1998 for its role in the global sorbates cartel; in 2003 the EU imposed a fine of $116 million on Höchst (by then Aventis) for the sorbates violation. Id. Thus, three of the co-conspirators in the vitamins cartels are known to have fixed prices in previous or concurrent international cartels that operated in the 1990s. Doubtless there are other instances of repeated violations of the antitrust laws by other members of the vast vitamins cartel that have not been discovered or publicly reported.

These three examples drawn for the vitamins case are neither isolated nor merely anecdotal. The phenomenon of repeated violations of the antitrust laws of the United States and the European Union has been the subject of scholarly examination. See Private International Cartels App. Table 5 at 124-125. This research collects information on international cartels involving 167 different products that were uncovered by one or more of the world's antitrust authorities between January 1990 and July 2003. These data are believed to be reasonably complete. Out of the hundreds of companies identified as participants in these cartels, more than 50 companies participated in contemporary cartels with respect to two or more of these products. Id.[28] Five companies are known to have participated in price-fixing cartels with respect to ten or more products, and 13 in cartels with respect to five or more. There are a few instances of true recidivism, but most of the cases just mentioned are matters of companies colluding in overlapping agreements with respect to multiple product lines. For example, the Dutch chemical maker Akzo Nobel engaged in international price-fixing agreements concerning ten product lines: choline chloride (vitamin B4), sodium gluconate, MCAA, soda ash, explosives, auto paints, organic peroxides, PVC

[28] Some of these companies were also convicted or fined as members of purely domestic cartels or of international cartels that were active in periods prior to 1990. Thus, these data on repeated participation are undercounts.

additives, rubber processing chemicals, and MBS. Id. 124. Perhaps it is best to call such behavior serial price-fixing.

8. DETERRING INTERNATIONAL CARTELS.

The fact that so many companies engage in repeated violations of U.S. and EU competition laws is symptomatic of deeply rooted business behavior. The roots of price-fixing conduct lie in the structures of markets. See, *e.g.*, Global Price Fixing 522-527; Private International Cartels 8-11. Common to all discovered cartels is "small numbers" (a high degree of industrial concentration of ownership among sellers) coupled with a high degree of control of the market by members of the cartel. Similarly, cartels are more effective when buyers are many and none purchase large shares of the cartelized product. A third nearly universal feature of markets with cartel activity is that the products are standardized commodities with few or no substitutes even when a cartel raises its price to a level well above normal. Storable products that are cheaply transported long distances make better candidates for internationally collusive schemes than perishable items.[29]

The vitamins cartel illustrates the importance of these market characteristics. Global market concentration was high (the top four or five firms accounted for more than 75% of production), the cartel members comprised the top tier of manufacturers, more than ten thousand companies purchased bulk vitamins directly from the cartel, the biological functions of vitamins insured their uniqueness in demand, and high vitamin prices permitted long-distance trade.

[29] The members of the lysine cartel for example were convicted for their price agreements in the dry lysine market. Liquid lysine, which sold for less than $0.50 per pound and could not be transported economically by tanker vehicles more than a few hundred miles from the plants in which it was made was not subject to direct price manipulation by the cartel.

Beyond these three characteristics are a number of market features that generally facilitate overt collusion but that may not be necessary conditions. Cartelized markets tend to be mature; growth tends to be steady and predictable; rapid changes in product design or in methods of manufacture tend to be things in the past.[30] Transactions are typically made through private bilateral negotiations that are not directly observable to third parties, and most sales are made by means of long term supply contracts. Terms of sale (delivery services, quantity discounts, rebates, recognized grades, quality premiums, etc.) have long been standardized throughout the industry. Leading companies may have had years of strategic interaction with one another. Barriers to entry are formidable, thus severely limiting the number of potential entrants should prices rise significantly. Again, the markets for bulk vitamins by and large display these facilitating factors.

Such a mix of market characteristics is found in only a minority of the world's industries. The structures and practices in the manufacturing and mining industries foster cartelization, whereas the organization of retail sales of manufactures does not. Manufacturing of organic chemicals embodies them, while production of inorganic chemicals does not.

The import of these observations is that collusion is rational in some industries but foolhardy in others. By calling collusion "rational" economists intend to characterize cooperative business choices that are expected to generate greater profits than alternative strategies. See generally Polinsky and Shavell, "The Economic Theory of Public

[30] Cartel formation is frequently, perhaps usually preceded by an actual or impending "crisis" (as perceived by cartel members): markedly slowing growth, falling prices, rising inventories, low rates of capacity utilization or similar conditions that have caused or are about to cause profits to decline to what are by the standards of the industry historically low rates.

Enforcement of the Law," 38 *J. Economic Literature* 45 (2000); Posner, Antitrust Law 266-274 (2d ed. 2001). The field of legal economics that studies crime and punishment is founded on the idea that persons choose crime because the *anticipated benefits exceed the expected losses*. When the benefits (monopoly profits) exceed the losses (antitrust fines and penalties), deterrence will not be achieved.[31]

There are two major reasons why it is rational for firms contemplating global price fixing to proceed. First, *actual* cartel profits have historically exceeded the financial penalties meted out by the world's courts and commissions. It is reasonable to suppose that *future expectations* about the benefit/cost ratio of international price fixing will be tempered by historical experience. As this brief has demonstrated, the total collusive overcharges imposed by the vitamins cartel greatly exceeded the global fines and penalties extracted from the cartelists. This result follows from the leniency policies of the most active anticartel authorities, from the difficulties of plaintiffs in U.S. civil suits in achieving double or even single damages, from the absence of civil suits abroad, and from the near absence of any kind of enforcement outside North America and the EU.[32] The facts regarding anticartel sanctions presented above support a similar conclusion in the case of other global cartels uncovered since 1990.

[31] When they are equal, deterrence is said to be optimal. Optimal deterrence theory usually assumes that the government has no residual uncertainty and that would-be corporate criminals are risk-neutral. If a corporation is instead risk-avoiding, the optimal punishment level for the same level of anticipated benefits will be lower.

[32] Of course some cartels are uncovered and sued only by private parties, but the reverse is by far the most common pattern. Once one antitrust authority is alerted to the existence of a cartel, these days the others will soon know.

Second, global cartelists have reason to expect that their secret price fixing will probably remain hidden. The probability of being apprehended by one or more of the world's antitrust authorities is not known with certainty, but it is certainly less than 100%. The most reliable sources assert that the probability of any kind of private cartel being caught before the agreement is dissolved for other reasons is in the range of 10% to 33%. See Private International Cartels 63 (collecting sources).[33] It is true that most of these estimates date from periods before the full force of today's U.S. criminal sanctions and leniency inducements were felt. Nevertheless, there is little reason to believe that the true probability of detection is outside this range.[34]

Even if corporate antitrust fines and penalties were to be applied in Europe and North America at their maximum levels, the low probability of detection alone may still result in suboptimal deterrence. When one also considers the application of leniency policies in the negotiation of fines, the absence of criminal enforcement outside of two continents, and the inability of injured parties to seek civil restitution outside of North America, the profitability of global price fixing is assured. An approach such as that taken by the court below is necessary if the enforcement of American law is to have any realistic hope of protecting American consumers and the American economy by approaching optimal levels of deterrence of anticompetitive behavior by international price-fixing cartels.

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[33] The legal-economic literature on this point is scanty. Seven sources are cited on the page cited in the text. The only empirical economic study finds a 13% to 17% discovery rate. Even after detection, successful prosecution of objectively guilty international conspiracies is uncertain.

[34] Polinsky and Shavell note that arrest rates for the most common felonious property crimes are between 13% and 17%. Polinsky and Shavell, "The Economic Theory of Public Enforcement of the Law," 38 J. *Econ. Lit.* 45, 71 n. 77 (2000).

PRINCIPAL CONCLUSIONS

Modern international cartels with global reach present a knotty challenge to current antitrust enforcement practices.

Cartels that sell internationally tradable commodities and that aim to fix prices in two or more regions with different national currencies cannot control currency exchange rates. As a consequence, private international cartels must prevent geographic arbitrage through frequent realignment of national prices if their control over price is to succeed. The vitamins cartels and scores of the largest cartels uncovered by antitrust authorities since 1990 embody these characteristics, and direct evidence exists that cartel managers in fact were aware that unchecked arbitrage would undermine their scheme. Therefore, the purchases of wholly foreign buyers play an integral role in creating the antitrust injury incurred by wholly domestic direct purchasers.

Even under ideal prosecutorial outcomes, in the absence of affirmance of the decision below, the global reach of modern cartels insures that the monetary payouts of guilty international cartelists cannot succeed in disgorging all the illegal cartel profits. That is, the imposition of maximum government fines combined with fully successful civil suits in North America will inevitably result in amounts less than single global damages. It would therefore be utterly rational for would-be cartelist to form or join an international price-fixing conspiracy. Only if treble damages are available to wholly foreign buyers might the balance tip: if plaintiffs like Respondents are successful in American courts, the monetary penalties imposed on prosecuted members of cartels could, at least in theory, in most cases exceed the monopoly profits. Cartel formation will be discouraged.

Even assuming prosecutorial conditions will resemble recent historical patterns of punishment, a judgment of affirmance will greatly improve international cartel

deterrence and will lead it to approach optimal deterrence. The precise degree of deterrence will depend on the perceived probability that international cartels will be detected, investigated, and convicted. It is widely believed that the probability of detecting clandestine cartels is less than one-third. The degree of deterrence will also depend on the proportion of the price-fixing overcharges awarded to plaintiffs in civil suits, which on average has been less than 100% and in individual cases never exceeds double damages. If these estimates are correct and conditions remain unchanged, permitting wholly foreign buyers to seek redress for antitrust injury in U.S. courts, will mean that typical would-be cartelists will face, if not an optimal level of deterrence, the likelihood of a much smaller degree of underdeterrence than exists today.

Respectfully submitted,

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